Tan Ah Tong v Perwira Affin Bank Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-21-165 OF 1998
ABDUL MALIK ISHAK J
27 JULY 2001

Land Law *— Charge — Illegality — Unlicensed housing developer — Charges in favour of bank by unlicensed developer — Whether charges illegal and unenforceable*

The first defendant and the third to fifteen defendants had applied by way of a summons in chambers to strike out the amended statement of claim of the plaintiff under O 18 r 19 of the Rules of the High Court 1980 on grounds that it is scandalous, frivolous or vexatious; or prejudicial and embarrassing; or an abuse of the process of the court. The plaintiff was at the material times the registered proprietor of five master titles. Sometime between 1974 to 1982, the plaintiff sold various sublots of vacant lands as bungalow lots 'free from encumbrances' to various purchasers, which included the third to fifteen defendants. At about the same time, the plaintiff offered the five master titles as collateral to the first defendant who would provide overdraft facilities and bridging financing for a development project to build bungalows by a development company known as Asialand Development Sdn Bhd ('Asialand') and it was by way of third party charges. The thrust of the plaintiff's amendment in the statement of claim was that the charges created by him in favour of the first defendant to secure the loan given to Asialand of which the plaintiff was the chairman, director and major shareholder were illegal because at the time, his company, Asialand, did not have a development license and was thus in breach of the Housing Developers (Control and Licensing) Act 1966 ('the 1966 Act'). In short, the plaintiff was saying that because of this illegality, the charges were invalid and he wanted the first defendant to return the titles to him.

Held, allowing the application:

(1) From the available evidence, it would be correct to say that Asialand had no valid licence issued under the 1966 Act and that being the case, Asialand was opened to prosecution under s 18 of the same Act. The plaintiff had deceived the Comptroller of Housing appointed under s 4 of the 1966 Act by undertaking development without a licence. This was certainly a case where the court would not lend its aid to the plaintiff who had founded his cause of action upon an immoral or an illegal act (see p 89D–E).

(2) It would be gross fraud on the first defendant to allow the plaintiff — being the chargor of the subject security and a self confessed 'alter-ego' of Asialand (the principal borrower) who, having taken the loan facility from the first defendant and had used that loan for the subject development project to build and sell bungalow houses, and had defaulted in all their repayments thereto — to now come before this court pleading their own very act of 'illegality' for

having infringed the 1966 Act for the sole purpose of asking and imploring the court to set aside the loan facility and to strike down the order for sale without having to make any repayment to the first defendant nor to return the relevant land titles to the third to fifteen defendants, the right interveners (see p 95F–G).

(3) When an issue could and should have been raised in an earlier proceeding, one was precluded from raising it again in a subsequent action. The present plaintiff was estopped from taking out the present suit purportedly on a further and different cause of action which was available to him at the outset. The conduct and the inaction of the plaintiff must be construed against him. The illegality issue was raised too late in the day. The plaintiff's claim must be struck out on the ground of res judicata (see pp 97I–98A, 100D, 101B, E).

(4) The rights of the first defendant and the purchasers (third to fifteen defendants) had been prejudiced for more than 20 years after taking into account the first sale of the land which took place in 1973. In order to obstruct the settlement reached between the first defendant and the purchasers, the plaintiff had filed this suit and applied to stay the auction of those lands. The plaintiff's conduct showed that his claim was mala fide and it was abuse of the process of the court (see pp 102G–H, 103A).

[Bahasa Malaysia summary

Defendan pertama dan defendan-defendan ketiga hingga kelima-belas telah memohon melalui saman dalam kamar untuk membatalkan penyataan tuntutan pindaan plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan-alasan bahawa ia adalah melampau, remeh atau menyusahkan; atau prejudis dan memalukan; atau satu penyalahgunaan proses mahkamah. Plaintif pada masa matan adalah pemilik berdaftar lima hakmilik-hakmilik asal. Antara tahun 1974 hingga 1982, plaintif telah menjual beberapa sublot-sublot tanah kosong sebagai lot-lot bungalow 'bebas daripada bebanan' kepada beberapa pembeli, termasuklah defendan-defendan ketiga hingga kelima-belas. Pada masa yang sama, plaintif telah menawarkan kelima-lima hakmilik asal tersebut sebagai kolateral kepada defendan pertama yang akan menyediakan kemudahan overdraf dan kewangan berjangka untuk satu projek pembangunan bagi membina bungalow-bungalow oleh sebuah syarikat pemaju yang dikenali sebagai Asialand Development Sdn Bhd ('Asialand') dan ia adalah melalui gadaian-gadaian pihak ketiga. Teras pindaan plaintif di dalam penyataan tuntutan adalah bahawa gadaian-gadaian yang dibuat oleh beliau untuk kepentingan defendan pertama bagi menjamin pinjaman tersebut diberikan kepada Asialand di mana plaintif adalah pengerusi, pengarah dan pemegang saham utama adalah menyalahi undang-undang kerana pada masa tersebut, syarikat beliau, Asialand, tidak mempunyai lesen pemaju dan oleh itu telah

A melanggar Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta 1966 tersebut'). Pendek kata, plaintif mengatakan bahawa disebabkan oleh kepenyalahan undang-undang tersebut, gadaian-gadaian tersebut tidak sah dan beliau menghendaki defendan pertama mengembalikan hakmilik-hakmilik tersebut kepada beliau.

B **Diputuskan**, membenarkan permohonan tersebut:

(1) Berdasarkan keterangan yang sedia ada, adalah betul untuk mengatakan bahawa Asialand tidak mempunyai lesen sah yang dikeluarkan di bawah Akta 1966 tersebut dan dalam keadaan ini, Asialand, terbuka untuk pendakwaan di bawah s 18 Akta yang C sama. Plaintif telah memperdayakan Pengawal Perumahan yang dilantik di bawah s 4 Akta 1966 tersebut dengan menjalankan pembangunan tanpa lesen. Ini sememangnya satu kes di mana mahkamah tidak boleh membantu plaintif yang telah memulakan kausa tindakan beliau berdasarkan satu tindakan yang tidak D bermoral atau menyalahi undang-undang (lihat ms 89D–E).

(2) Adalah fraud yang melampau ke atas defendan pertama jika plaintif — sebagai penggadai jaminan yang diperkatakan dan mengaku sendiri adalah 'alter ego' Asialand (peminjam utama) yang, setelah mengambil kemudahan pinjaman daripada defendan pertama dan telah menggunakan pinjaman tersebut E untuk projek pembangunan yang diperkatakan untuk membina dan menjual rumah-rumah bungalow, dan telah gagal dalam semua pembayaran balik mereka — sekarang menghadap mahkamah ini memplikan tindakan mereka sendiri yang 'menyalahi undang-undang' kerana telah melanggar Akta 1966 F tersebut semata-mata bagi tujuan memohon dan mendesak mahkamah untuk mengetepikan kemudahan pinjaman tersebut dan membatalkan perintah jualan tanpa perlu membuat apa-apa pembayaran balik kepada defendan pertama mahupun mengembalikan hakmilik-hakmilik tanah yang relevan kepada defendan-defendan ketiga hingga kelima-belas, yang merupakan G pencelah-pencelah yang sebenarnya (lihat ms 95F–G).

(3) Apabila satu persoalan boleh dan patut ditimbulkan di dalam prosiding yang terdahulu, seseorang itu dihalang daripada menimbulkannya lagi di dalam tindakan berikutnya. Plaintif sekarang ini diestopkan daripada memulakan guaman sekarang H atas kausa tindakan kemudian yang berbeza, di mana kausa tersebut telah sedia ada untuk beliau pada permulaannya. Kelakuan dan ketiadaan apa-apa tindakan daripada plaintif mesti ditafsirkan menentang beliau. Persoalan tentang kepenyalahan undang-undang telah lambat ditimbulkan. Tuntutan plaintif mestilah dibatalkan atas alasan res judicata (lihat ms 97I–98A, I 100D, 101B, E).

(4) Hak-hak defendan pertama dan pembeli-pembeli (defendan-defendan ketiga hingga kelima-belas) telah diprejudiskan lebih

daripada 20 tahun setelah mengambilkira jualan pertama tanah tersebut dalam tahun 1973. Bagi menghalang penyelesaian dicapai antara defendan pertama dan pembeli-pembeli, plaintif telah memfailkan guaman ini dan memohon untuk menggantung lelongan tanah-tanah tersebut. Perbuatan plaintif menunjukkan bahawa tuntutan beliau adalah mala fide dan ini adalah penyalahgunaan proses mahkamah (lihat ms 102G–H, 103A).]

Notes

For case on charges generally, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1856–2098.

Cases referred to

Air Conditioning Systems Design Sdn Bhd v Chuah Teong Hooi & Anor (as receiver and managers of the property of Atlas Intek (M) Sdn Bhd) [1998] 4 MLJ 633 (refd)

Allkins v Jupe (1877) 2 CPD 375 (refd)

Archbolds (Freightage) Ltd v S Spanglett Ltd (Randall, third party) [1961] 1 QB 374; [1961] 1 All ER 417 (refd)

Ashmore, Benson, Pease & Co Ltd v AV Dawson [1973] 1 WLR 828 (refd)

Aspatra Sdn Bhd & Ors v Bank Bumiputra (M) Bhd & Anor [1988] 1 MLJ 97 (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)

Begbie v Phosphate Sewage Co (1875) LR 10 QB 491; (1876) 1 QBD 679 (refd)

Berg v Sadler and Moore [1937] 2 KB 158 (refd)

Brookes, Ex p (1822) 1 Bing 105 (refd)

London, Chatham & Dover Rail Co v South Eastern Rail Co (1888) 40 Ch D 100 (refd)

Chung Khiaw Bank Ltd v Tio Chee Hing [1987] 2 MLJ 701 (refd)

Evans v Bartlam [1937] AC 473 (refd)

Goodall v Lowndes (1844) 6 QB 464 (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)

Holman v Johnson [1775–1802] All ER Rep 98; (1775) 1 Cowp 341 (refd)

JM Allan (Mechandising) Ltd v Cloke & Anor [1963] 2 QB 340 (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Interveners) [1996] 2 MLJ 431 (refd)

Leong Cheong Kweng Mines Ltd v Kok Hoong [1962] MLJ 224 (refd)

Lubbock v Potts (1806) 7 East 449 (refd)

Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] MLJ 281 (refd)

Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd [1971] 2 MLJ 161 (refd)

Lowry v Bourdieu (1780) 2 Doug 468 (refd)

Mansouri v Singh [1986] 1 WLR 1393 (refd)

Moore v Gamgee (1890) 25 QBD 244 (refd)
Muckleston v Brown (1801) 6 Ves 52 (refd)
MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642 (refd)
Myers, Re [1908] 1 KB 941 (refd)
Nasib Singh v Ramasamy [1969] 1 MLJ 211 (refd)
National Benefit Assurance Co, Re [1931] 1 Ch 46 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
OCBC Bank (M) Bhd v Kredin Sdn Bhd [1997] 2 MLJ 544 (refd)
Parkinson v College of Ambulance and Harrison [1925] 2 KB 1 (refd)
Patriot Pte Ltd v Lam Hong Commercial Co [1980] 1 MLJ 135 (refd)
Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309 (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (refd)
Regazzoni v KC Sethia (1944) Ltd [1958] AC 301 (refd)
Sara Mehaffey v David Mehaffey (1905) 2 Irish Reports 292 (refd)
Scott v Brown, Doering, McNab & Co (1892) 2 QB 724 (refd)
Scott, Re (1813) 1 M & S 751 (refd)
Shaw v Shaw [1965] 1 WLR 537 (refd)
Siang Yam Beng v Marushin Canneries (M) Sdn Bhd & Anor [1995] 4 MLJ 691 (refd)
Simpson v Bloss (1816) 7 Taunt 246 (refd)
Siow Kwang Joon & Anor v Asia Commercial Finance (M) Bhd [1996] 3 MLJ 641 (refd)
Spector v Ageda [1973] Ch 30 (refd)
Suntoso Jacob v Kong Miao Ming & Anor [1984] 2 MLJ 95 (refd)
Thistlewood v Cracroft (1813) 1 M & S 500 (refd)
Thomas Brown & Sons v Fazal Deen (1962) 108 CLR 391 (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)
Tye Kow (t/a Hup Lee Trading) v Yap Seow Hwa & Anor [2000] 5 MLJ 175 (refd)
United City Merchants (Investments) Ltd v Royal Bank of Canada [1983] AC 168 (refd)
Wild v Simpson [1919] 2 KB 544 (refd)

Legislation referred to

Contracts Act 1950 s 24(a), (b)
Housing Developers (Control and Licensing) Act 1966 ss 4, 5(1), 18
Malay Reservations Enactment (FMS Cap 142) s 13
National Land Code 1965 ss 202, 267
Rules of the High Court 1980 O 18 r 19, O 92 r 4
Specific Relief Act 1950 ss 4, 26(b)

Ngeow Yin Ngee (*CY Ngeow & Associates*) for the plaintiff.
Leong Wai Hong (*Lim Jit Kiong* with him) (*Skrine*) for the first defendant.
Wong Kim Lin (*KL Wong & Lim*) for the third to fifteenth defendants.

Abdul Malik Ishak J: The first defendant, namely, Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank (M) Bhd), had applied by way of a summons in chambers in encl 47 to strike out the plaintiff's amended statement of claim in encl 31 under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). To be precise, encl 47 was worded in this way:

> (1) that the plaintiff's amended statement of claim herein be struck out and the action herein against the first defendant be dismissed on the grounds that the amended statement of claim:
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> (a) is scandalous, frivolous or vexatious; or
> (b) is prejudicial and embarrassing; or
> (c) it is an abuse of the process of this court;
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> under O 18 r 19 of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court;
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> (2) such further or consequential orders as this honourable court may deem fit or necessary; and
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> (3) that the plaintiff do forthwith pay the first defendant its costs of and occasioned by this action, including the costs of this application.

and the grounds in support were said to be (see encl 47 thereof):

> The grounds of the application are that this honourable court is functus officio and the issues raised are res judicata and also on the further grounds as stated in the affidavit of YEO KHAY ANN filed herein.

That summons in chambers in encl 47 was supported by an affidavit of Yeo Khay Ann that was affirmed on 25 November 1999 and filed on the next day, as seen in encl 44. By way of a reply, the plaintiff affirmed an affidavit on 22 December 1999 which was filed on the next day as seen in encl 56.

The third to the fifteenth defendants affirmed an affidavit in reply on 20 January 2000, as seen in encl 57, which was in turn filed on the next day. Enclosure 57 was styled as the 'intervener's reply affidavit (third to fifteenth defendants)' and it replied to two matters. The first was in relation to the plaintiff's application for summary judgment, while the second relates to the first defendant's application to strike out the plaintiff's claim. Incidentally, the third to the fifteenth defendants filed their statement of defence on 21 January 2000, as seen in encl 58. That statement of defence in encl 58 was dated 19 January 2000.

By way of encl 82, which was dated 10 August 2000, the third to the fifteenth defendants applied to strike out the plaintiff's amended statement of claim in encl 31. In encl 82, the third to the fifteenth defendants sought the following prayers:

> (1) that the plaintiff's amended statement of claim herein be struck out and the action herein against the third to fifteenth defendants be dismissed on the grounds that the amended statement of claim:
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> (a) is scandalous, frivolous or vexatious; or
> (b) is prejudicial and embarrassing; or
> (c) it is an abuse of the process of this court;
>
> under O 18 r 19 of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court;

(2) such further or consequential orders as this honourable court may deem fit or necessary; and

(3) that the plaintiff do forthwith pay the third to fifteenth defendants their costs of and occasioned by this action including the costs of this application.

and on the following grounds:

> The grounds of the application are that this honourable court is functus officio, that is the court has no jurisdiction to decide on the issues in the plaintiff's amended statement of claim and the issues raised are res judicata, that is the plaintiff is estopped from further raising any issues pertaining to the charges and other interests lodged (on) the same subject land vide the five master titles hereinafter set out, and also on the further grounds as stated in the affidavit in support of GOON GOOI CHENG (f) filed herein.

Enclosure 82 was supported by an affidavit styled as an 'affidavit in support' of the third defendant by the name of Goon Gooi Cheng (f), as seen in encl 81 which was dated 9 August 2000 and filed on the next day. The plaintiff responded to encl 81 by filing an affidavit in reply on 1 September 2000, as seen in encl 98. The third to the fifteenth defendants responded by filing an affidavit in reply through Goon Hooi Cheng (f) on 27 September 2000 as seen in encl 104.

Now, in relation to the first defendant's application by way of a summons in chambers in encl 47, the senior assistant registrar ('the SAR') on 3 March 2000 disallowed the first defendant's application to strike out. Aggrieved by the decision of the SAR, the first defendant filed an appeal to the judge in chambers as seen in encl 64.

This judgment focussed itself on encll 64 and 82 respectively.

On striking out, the Court of Appeal, speaking through Siti Norma Yaakob JCA (now FCJ) succinctly laid down the law in the case of *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309. At pp 320–321 of the report, her Ladyship, in refined words, had this to say:

> The discretionary power to dismiss an action summarily under O 18 r 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim (see *Tractors (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1). Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success (see *McKay & Anor v Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890).
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> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). Likewise, where the affidavit evidence discloses a dispute of facts, such

> facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

Finally, at p 330 of the report, her Ladyship rounded it up by saying:

> As for the issue of law raised against the fourth respondent, since that can be determined from the undisputed documentary evidence, a trial of the action will not add anything more to what has already been canvassed before the trial judge and before us. If anything at all, if this suit proceeds to trial it will be with the hope that something may turn up at the trial but in the light of the affidavit and documentary evidence, we found that the respondents have no case to answer.

Again on striking out, Lord Diplock had this to say in *Tractors (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1:

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution. Had the matter depended upon the contents of the statement of claim alone, their Lordships would have been loth to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the Statement of Claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were sufficiently arguable to justify proceeding to trial. In refusing to submit the evidence to critical examination, however, the Federal Court erred in law. This makes it necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the New Action could not possibly succeed.

and, clearly, there was a need in the present exercise to submit the evidence to critical examination.

In *Siang Yam Beng v Marushin Canneries (M) Sdn Bhd & Anor* [1995] 4 MLJ 691, I had occasion to say that (see p 700 of the report):

> The courts are always wary and will thread cautiously before summarily striking out the statement of claim and barring the plaintiff access to trial by calling witnesses. Lord Diplock in *Tractors (M) Bhd v Tio Chee Hing* described that power as drastic and I may add it is also draconian in nature. Seah FJ (as he then was) in *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347 at p 350 referred to *Lawrance v Lord Norreys* (1890) 15 App Cas 210 at p 219 and quoted the words of Lord Herschell in that case to the following effect:
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> > 'It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.'

and continuing at p 701 of the report, this was what I said:

> *Pertamina v Kartika Ratna Thahir & Ors* [1983] 1 MLJ 136 lays down the now famous principle that only in plain and obvious cases should recourse be had

A to the summary process under O 18 r 19 of the RHC . The question to ask in regard to the present suit is this: Is it that plain and obvious for this court to strike out the writ and the statement of claim of Siang in the present suit?

Indeed, the law books are replete with authorities on striking out. Judges have been very prolific on this subject matter. Thus, in *Chung Khiaw Bank Ltd v Tio Chee Hing* [1987] 2 MLJ 701, the then Supreme Court, speaking B through Wan Suleiman SCJ had this to say at p 703 of the report:

> It was held that in determining whether proceedings were vexatious, the court must look at the whole history of the matter, not solely at the question whether the pleadings had disclosed a cause of action.

C In the same vein, this was what Peh Swee Chin SCJ said in the case of *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 at pp 23–24:

> In *Tractors* [1975] 2 MLJ 1, the defendants applied to set aside the pleadings there on the grounds that they were frivolous and vexatious. The High Court D allowed the application holding that the action was bound to fail. The Privy Council held that the Federal Court was in error for not examining the evidence and deciding as to whether the action there was bound to fail, though the power to dismiss an action summarily was a drastic power. The Privy Council went through the evidence with a fine toothed comb and decided to agree with the learned judge at the first instance and restored the High Court's decision. It is to be remembered that the High Court always has E an inherent jurisdiction to prevent abuse of its process, irrespective of whether it is expressly called for or not in an application under O 18 r 19 of the RHC unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.
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> F In passing, we would like to say that we are not unmindful of the interesting arguments on certain legal points which were however only advanced by learned counsel for the appellants, made necessary no doubt by the then possibility that this court might hold that the letter of 1990 ought to be read as being subject to the letter of 1989. The said legal points were the common law rule in *Pinnel's* case (1602) 5 Co Rep 117a, s 65 of the Contracts Act 1950, etc but they are not necessary for the court in reaching its decision. G It would not be appropriate to deal with them here and now and they have to be put away for another day.
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> In conclusion, with great respect, the learned judge could have avoided the pitfall as described by the Privy Council in *Tractors* [1975] 2 MLJ 1. The lower court should have also scrutinized the evidence in order to decide whether the action was bound to fail. If so, it would have been found otiose to H send the case back to its starting point to start its long and expensive course, albeit such a conclusion was reached on an application filed under O 18 r 19 of the RHC.
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> We must emphasize that for any court to reach such a similar decision on an application under O 18 r 19 of the RHC, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits I on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

We therefore allow the appeal herein by restoring the decision of the learned registrar in question in striking out the amended statement of claim and also dismissing the claims of the plaintiff/company in the civil suit concerned herein. The respondent will have to pay costs here and below.

Appeal allowed.

At the end of the day, it was entirely an exercise on my part to examine the available evidence and to decide whether this was indeed a plain and obvious case to invoke the summary process under O 18 r 19 of the RHC.

Facts of the case

From the relevant affidavits, the following facts may be pieced together. The plaintiff is and was at the material times the registered proprietor of five master titles vide Grant 7188 Lot 94, EMR 2532 Lot 201, EMR 2146 Lot 349, EMR 2147 Lot 350, and EMR 2251 Lot 515; and all these were in the Mukims of Ulu Kelang. The five master titles went through a chequered history through the years extending more than twenty years ago. This very case went through the hands of some other judges before it came to me as they were, so to speak. Sometime between 1974 to 1982, the plaintiff sold various sublots of vacant lands as bungalow lots '*free from encumbrances*' to various purchasers which included, inter alia, the third to the fifteen purchasers. At about the same time, the plaintiff offered the five master titles as collateral to the first defendant who would provide overdraft facilities and bridging financing for a development project to build bungalows by a development company known as Asialand Development Sdn Bhd and it was by way of third party charges.

The subject of the plaintiff's claim comprised in the five master titles and each master title contained the following pieces of lands:

(1) Lot 4235 HS (D) 16193 to Lot 4267 HS (D) 16225 (formerly known as master title Grant 7188 Lot 94);

(2) Lot 4192 HS (M) 1682 to Lot 4197 HS (M) 1687 (formerly known as master title EMR 2251 Lot 515);

(3) Lot 4198 HS (M) 1688 to Lot 4214 HS (M) 1704 (formerly known as master title EMR 2146 Lot 349);

(4) Lot 4215 HS (M) 1705 to Lot 4234 HS (M) 1724 (formerly known as master title EMR 2147 Lot 350); and

(5) Lot 4268 HS (M) 1725 to Lot 4287 HS (M) 1744 (formerly known as master title EMR 2432 Lot 201).

Asialand Development Sdn Bhd ('Asialand') had its chairman in the person of the plaintiff who held a 40% share. By letter dated 25 April 1977, Asialand wrote to the first defendant and gave details of its directors; and that letter can be seen in exh 'A–1' of encl 44 and it was worded as follows:

Re: Application for Temporary Overdraft Facility

We write to request for an overdraft facility of M$15,000 for a maximum period of 4 (four) months for payment of earthwork for our Tangkak Project.

We are pleased to submit the following for your perusal.

1 Name of Director			*Shareholdings*
(A) TAN AH TONG	—	Chairman	40%
(B) TAN GIN THIAM	—	Managing Director	20%
(C) TAN CHING JOON	—	Director	20%
(D) WONG KHAN CHIU	—	Director (Housewife)	20%

DIRECTORS' NET WORTH	*Assets*	Value
(1) TAN AH TONG	8 acres of Building Land in the Mukim of Ulu Kelang, Selangor.	M$500,000
(2) TAN CHING JOON	Please refer to the accounts of Syarikat Lian Aik Security at Perwira Habib Bank Bhd, Central Branch	

	Assets	*Value*
(3) TAN GIN THIAM	(A) 12 Acres of Oil Palm Land in the Mukim of Ijok (Kuala Selangor)	M$30,000
	(B) 1/3 shares of 44 acres 10th Mile, Jalan Kuantan, Gompang. 100,000	
	(C) 1/3 share of 2 shop lots at Batang Berjuntai.	25,000
	(D) 1/3 share of the single storey bungalow at Batang Berjuntai.	15,000
		M$170,000

Board of Directors' Resolution enclosed.

Background safewill

TAN AH TONG	— Managing Director of Tan Realty Development Sdn Bhd Has been in development line since 1972.
TAN CHING JOON	— Sole-proprietor of CHOP LIAN AIK, a company which deals mainly with hardware materials. Has been in business since 1968.
TAN GIN THIAM	— Managing Director of Syarikat Feldspar Sdn Bhd, a company which deals with export of minerals. Has been in business since 1973.

If the facility is approved, repayment will be from collections received for the purchase of our Tangkak project.

We trust the above information is sufficient and look forward to receive a favourable reply from you soon.

Yours faithfully,
ASIALAND HOUSING DEVELOPMENT SDN BHD
Sgd (Illegible).
.....
Managing Director

It can safely be said that the plaintiff played a prominent role in Asialand — as a chairman, director and majority shareholder. The first defendant in due course approved the overdraft facilities of Asialand on the strength of the five master titles.

It must be emphasized that four master titles came under order for sale dated 28 February 1989 by the Gombak land administrator and in tabulated forms the scenario would be like this:

	Master Titles	*Particulars of subdivided titles*	*No of sub-divided titles*	*Charges registered*
(1)	EMR 2146 Lot 349	HS (M) 1688 – 1704 for Lots 4198 – 4214	17 (Land Office Titles)	Presentation No 284/80 No 285/80
(2)	EMR 2147 Lot 350	HS (M) 1705 – 1724 for Lots 4215 – 4234	20 (Land Office Titles)	Presentation No 284/80 No 285/80
(3)	EMR 2251 Lot 515	HS (M) 1682–1687 for Lots 4192–4197	6 (Land Office Titles)	Presentation No 284/80 No 285/80
(4)	EMR 2532 Lot 201	HS (M) 1725 – 1744 for Lots 4268–4287	20 (Land Office Titles)	Presentation No 815/78 No 816/78

Calculation wise the subject lands comprised under the Gombak land administrator's order for sale dated 28 February 1989 numbered 63 land office titles. By letter dated 20 May 1977, the Gombak land administrator approved the sub-division and conversion of the master titles subject to the payment of premiums. In Originating Summons No F31–3627 of 1986, NH Chan J (as he then was) on 24 April 1993 set aside the aforesaid charges vide presentation numbers 284/80 and 285/80 on the grounds that they were improperly registered as charges 'tertakluk kepada kaveator's interest.' The Order of his Lordship NH Chan J (as he then was) can be seen in exh 'GGC–6' of encl 104 and this very order was subsequently affirmed by the then Supreme Court.

As a result of and pursuant to the order for sale dated 28 February 1989 by the Gombak land administrator, there remained only EMR 2532 PT 201 vide HSM 1725–1744 for Lots 4268–4287 totalling 20 titles which could be legally auctioned off because the charges registered under presentation numbers 815/78 and 816/78 remained intact to this day. It must be emphasized that the first defendant's agreement for the lawful auction of the three master titles vide EMR 2146, EMR 2147 and EMR 2251 would be based on the principles of an equitable charge which the first defendant held based on the lien-holder's caveat which the first defendant had lodged upon the displacement of its charges bearing presentation numbers 284/80 and 285/80. To date, the first defendant has not proceeded yet with the foreclosure of the three master titles.

NH Chan J (as he then was) in the Kuala Lumpur High Court Originating Summons No S5–24 (31)–1641–87 had, on 5 September 1988, gave an order for sale for Grant 7188 Lot 94 and the particulars thereof may be stated as follows:

Master Title	*Particulars of subdivided titles*	*Number of subdivided titles*	*Charges registered*
Grant 7188 Lot 94	HS (D) 16193–16225 for Lots 4236–4267 and HS (D) 16226 for Lot 2324	34 (Registry Titles)	Presentation No 9657/77 and No 9658/77

Now, all together there were a total of 97 subdivided titles derived from the five master titles which formed the basis of the subject land which have been handed over by the plaintiff to the first defendant between 1977 to 1980 to be charged as security for facilities in financing projects developed by Asialand — a housing development company, which the plaintiff claimed that he was in control of at all material times.

In relation to the order for sale dated 28 February 1989 by the Gombak land administrator, although the third to the fifteen defendants were not parties to the said proceedings yet when alerted of the sale they instructed their counsel to intervene in order to stop the sale. Their counsel applied vide Kuala Lumpur High Court Originating Summons No S5–24–747 of 1989 to intervene and the parties in that originating summons were:

BETWEEN

(1) GOON KOON LEONG
(2) ONG CHONG EWE ... PLAINTIFFS

AND

(1) TAN AH TONG
(the purported owner/vendor of the subject lands)
(2) PERWIRA HABIB BANK (M) BHD
(the chargee of the subject lands)
(3) THE DISTRICT LAND ADMINISTRATOR, GOMBAK ... DEFENDANTS

The intervention proceedings in the Originating Summons No S5–24–747 of 1989 had been duly notified to the relevant parties and it was served on the plaintiff who was then the first defendant named therein. In due course, the learned judge in the person of NH Chan J (as he then was) granted the stay of the auction. The learned judge in the person of NH Chan J (as he then was) also directed the plaintiffs in the Originating Summons No S5–24–747 of 1989 to intervene in Kuala Lumpur High Court Originating Summons No F31–3627–86 in order to ensure that all the interested parties would be present to advance their own cause. It seemed that copies of the relevant cause papers had been duly served on the present plaintiff and the present first defendants and all these cause papers can be seen in exh 'GGC–3' of encl 81. Now, it would be ideal to reproduce the affidavit in support of the application to intervene in the Originating Summons No: S5–24–747 of 1989; which affidavit was affirmed jointly by Goon Koon Leong and Ong Chong Ewe. It was indeed an eye opener to read their affidavit and I must reproduce the contents of that affidavit forthwith:

> We are the plaintiffs abovenamed and the facts deposed herein are true to the best of our belief and knowledge.
>
> 2 We are seeking justice of this Honourable Court as the Land purchasers because we have beneficial interests in the land held under Grant for Land No 7188 Lot No 94 Mukim of Ulu Kelang Negeri Selangor in particularly those four subdivided lots vide Lots Nos 4251, 4246, 4270 and 4271 ('the said four lots') which had been approved for sub-division as at 1977 from the relevant main grants into its respective subsidiary titles and which said four lots have been identified and agreed to as such by all the respective parties in the consolidated suits (19) under title suit No 198 of 1982 vide the Agreed approved Plan marked as exh 'AB–1' and the approval letter for conversion and sub-division are both annexed hereto and marked as exhs 'GKL–1' and 'GKL–2'.
>
> 3 Originally, we had purchased four (4) undivided individual sub-lots in respect of that main grant of land held under Grant for Land No 7188 Lot 94 and under EMR No 2532 Lot 201 Mukim of Ulu Kelang, Selangor originally known as sublots Tauks 5, 6, 11A and 19A. Copies of the relevant sale and purchase agreements dated 14 August 1974 (two sets), 20 November 1974 and 18 December 1974 respectively are annexed hereto and marked as exhs 'GKL–3' to 'GKL–6'.
>
> 4 At the time of the purchase, the lands were agricultural lands and held under the terms of the Agreement (recitals 2, Cl 1, Cl 7C) and the first defendant undertook to deliver unencumbered titles to us upon issue and delivery of individual titles to the said lots.
>
> 5 We have all paid the full purchase price for the said four lots.
>
> 6 In order to protect our interests in the aforesaid undivided lots, we had caused to be lodged private caveats over the main grants of land. We annex hereto a copy of the relevant document of title evidencing the registration of the respective caveats highlighted in 'Yellow' and marked as exh 'GKL–7'.
>
> 7 In breach of the first defendant's obligation under the sale and purchase agreements aforesaid, the first defendant abovenamed had caused to be created over the main grants of land, charges in favour of Perwira Habib

Bank (M) Bhd, the second defendant thereby wrongfully encumbering our interests to the undivided sub-lots which we had long purchased and paid in full.

8 Particulars of the registration of the charges in 1977, 1978 and in 1980 highlighted in 'Pink' over the said lands are also shown on the copy of the document of title exhibited as 'GKL–8'.

9 As can be seen that some of the caveats lodged by us, the plaintiffs and other interveners or interested land purchasers of sub-lots were registered before the charges.

10 We have had further commenced proceedings in the High Court of Malaya at Kuala Lumpur vide Suit No 189 of 1981 and Originating Summons No F1290 of 1985 consolidated with 18 other suits, against the first defendant abovenamed for specific performance on the said sale and purchase agreements and other related remedies.

11 We were given to understand that the respective suits came up for final disposal before the honourable judge Dato' Puan Siti Norma Yaakob and judgment was given on the sixth day of April 1987 for specific performance thereof. Thereafter we being dissatisfied with the said judgment took the issue on appeal to the Supreme Court of Kuala Lumpur and obtained an order for variation of the trial judge's judgment on 27 March 1989. A copy of the judgment for variation is annexed hereto and marked as exh 'GKL–9'.

12 It has just been brought to our solicitor's attention that the second defendant abovenamed had long commenced foreclosure proceedings against the relevant said main grant by the issue of the statutory notice (Form 16D) dated 25 April 1988 and application for order for sale (Form 16G) dated 27 May 1988 and the said property has been fixed for public auction on 21 June 1989. Copies of the said second defendant's solicitors' (Messrs Skrine) notice dated 8 March 1989, statutory notice (Form 16D) and application for order for sale (Form 16G) are hereto marked and marked as exhs 'GKL–10' to 'GKL–12'.

13 We are advised by our solicitors that the second defendant through its solicitors had acted in contempt in failing to honour its undertaking to the court to give appropriate notice to our solicitors, Messrs KL Wong & Co when it commenced foreclosure proceedings. True extract copies of the minutes of the court file are annexed hereto and marked as exh 'GKL–13'.

14 Further we are advised that till todate the first defendant has not fulfilled his obligations for specific performance under the respective sale agreements.

15 We verily believe that the order for sale should be set aside on the grounds that the second defendant's interest in the said main grant is defeasible for reason that there is 'cause to the contrary' for this court to reverse or to declare that the order for sale granted by the third defendant was null and void:

(a) that the second defendant (chargee) was a party or privy to fraud together with the first defendant (chargor) in view of fact that our interests as land purchasers of which interests notice had been given to the whole world in virtue of our and other respective caveats lodged prior to the charges created;

(b) the title or interest of the second defendant was unlawfully acquired or created via the wrongful purported exercise of the power or authority of the third defendant (District Land Administrator, Gombak) based on a void instrument;

(c) that the order for sale was wrongfully obtained from the third defendant (District Land Administrator, Gombak) based on non-disclosure on the part of the second defendant and also on the fact that the subject-matter thereon were of void or invalid charge(s) which validity were much in question and which validity was/were in fact being questioned in another and other subsisting and pending civil proceedings vide Kuala Lumpur High Court Originating Summons No F31–3627–85 and Code No S5–24–(31)–1641–87 wherein the Order for auction sale of the relevant grant for land had also been stayed meantime to determine the issue of the validity of the respective charge(s) and the question of priority of interests.

16 Wherefore we humbly pray for order in terms as prayed.

In regard to the order for sale dated 5 September 1988 that was handed down by NH Chan J (as he then was), the present third to the fifteen defendants were alerted as to the existence of the notice of the proclamation of sale as advertised in the press on 15 March 1989 and they too quickly instructed their counsel to intervene in order to stop the sale and this was successfully done. Copies of the relevant cause papers have been exhibited as exh 'GGC–4' in encl 81 and it too emanated from the Kuala Lumpur High Court Civil Division S5–24(31)–1641–87 and the parties thereto were:

BETWEEN

PERWIRA HABIB BANK MALAYSIA BHD ... PLAINTIFF

AND

TAN AH TONG ... DEFENDANT

AND

(1) CHAN SOI FOO @ CHAN MAY FOONG

(2) GOON KOONG LEONG

(3) ONG CHONG EWE ... INTERVENERS

Civil Division No S5–24(31)–1641–87 was in the form of a summons in chambers and there the interveners sought from NH Chan J (as he then was) the following orders:

1 that the order for sale made on the 25 November, 1988 granted by this court to the plaintiff abovenamed be set aside; or ALTERNATIVELY, the plaintiff be stayed from executing the order for sale until such further order as the court may make;

2 that the abovesaid charges against the abovementioned grant for land be declared null and void;

3 that the 'Pendaftar Hakmilik Negeri Selangor' be ordered to strike out/cancel the above relevant charges on the above main grant and on all the subsidiary titles issued under the said main grant;

4 that such further other or incidental directions/orders as may be suitable to grant;

5 that the parties be at liberty to apply;

6 and that costs of this application be costs in the cause.

and his Lordship gave those orders on 15 March 1989 on these terms:

ORDER

UPON THE APPLICATION of the abovenamed applicants/proposed Interveners AND UPON READING the summons in chambers dated 11 March 1989 and the affidavit in support of Goon Koon Leong and Ong Chong Ewe affirmed on the 11 day of March 1989 and filed herein AND UPON HEARING Mr Palpanaban Devarajoo of counsel for the plaintiff abovenamed and Ms Wong Kim Lin of Counsel for the applicants/proposed interveners abovenamed and Mr Krishna Aiyer, Miss Lalini Das and Mr Chandran Nair of Counsel for other various Proposed Interveners, IT IS HEREBY ORDERED as follows:

(i) that the applicants abovenamed be given leave to intervene in the abovenamed proceedings;

(ii) that the title to this action be amended to include the applicants describing them as 'the Interveners';

(iii) that an interim stay be granted from executing the court order dated 25 November 1988, pending the disposal of an application on the part of the Interveners to set aside the court order for sale dated 25 November 1988 to be filed within two weeks from the date hereof in these proceedings; and

(iv) costs of this application be costs in the cause.

It seemed that NH Chan J (as he then was) also directed that all the interveners joined in the proceedings vide Originating Summons No F31–3627–86 in order to advance their respective reliefs. It seemed that lengthy submissions were made before NH Chan J (as he then was) and it was said that it ran into some years. Eventually, the long drawn court affair culminated in the consent order of 13 March 1998 entered into between the present first defendant and the third to the fifteen defendants and that order can be seen in encl 57 of exh 'GGC–3'. The consent order of 13 March 1998 was in relation to Originating Summons No F31–3627–86 and it involved the following personalities:

Between

SHAHBUDIN BIN MOHAMAD ... Plaintiff

And

1 PERWIRA HABIB BANK (M) BHD

2 DISTRICT LAND ADMINISTRATOR FOR GOMBAK

3 TAN AH TONG

4 PENDAFTAR HAKMILIK NEGERI SELANGOR...Defendants

And

1 KOH CHEE KEAN
2 CHONG SUA KHENG
3 VIVIAN OH (F)
4 PARAMJIT SINGH @ JAGJIT SINGH
5 TAN KIM SENG
6 FOONG MUN CHIEW
7 GOH HOON LIANG
8 LEOW BAN HAI
9 TEO CHIN HUAT
10 LOW PHENG WAI
11 JOGA SINGH DHALLIWAL
12 CHAO SZE MANG @ CHAW SAI MANG
13 LEE YOU KWAN @ LEE OOI KWAN
14 YAP SUAN HUA
15 CHAN SOI FOO @ CHAN MAY FOONG
16 GOON KOON LEONG
17 ONG CHONG EWE
18 DMP LOWE
19 CONNIE SI LOWE
20 VASANTHA KUMARI
21 ANIM BIN HARUN
22 ZAINAB BTE AHMAD ... Intervenors

The consent order itself was worded in this way:

BEFORE THE HONOURABLE MR JUSTICE DATO N H CHAN
THIS 13TH DAY OF MARCH 1998

IN CHAMBERS

CONSENT ORDER

UPON THIS ACTION COMING UP for hearing on this 13 day of March, 1998 in the presence of Mr Leong Wai Hong for the first defendant, Ms KL Wong for the first to 9th, 12th, 13th, 16th and 17th intervenors, Mr Gurmel Singh for the 15th intervenor, Mr Ramesh Sanghvi for the 18th and 19th Intervenors and Mr R Balakrishnan for the 20 Intervenor BY CONSENT IT IS ORDERED THAT the first to the 9th, 12th and 13th, 15th to 20th Intervenors herein discontinue this action against the first defendant on the following terms:

1 The Intervenors herein as appear in the first and second Schedules hereto will apply to discharge all the stay orders obtained by them in respect of the order for sale for land held under Grant 7188, Lot 94, Mukim of Ulu Klang in Kuala Lumpur High Court Originating Summons No S5–31–1641–87 and land held under EMR 2532, 2146, 2147, 2251 for

Lots 201, 349, 350 & 515, Mukim of Ulu Klang respectively in Kuala Lumpur High Court Originating Summons No S5–24–747–89.

2(a) Perwira Affin Bank Bhd ('the Bank') within 14 days of setting aside of stay orders respectively will apply to the High Court and Land Office for a new auction date for land held under Grant 7188 and EMR 2532 respectively. The Intervenors undertake to support this application.

(b) The Bank will also concurrently apply to the High Court and Land Office for a prohibitory order or otherwise howsoever deemed proper to auction the remaining land held under EMR 2146, 2147 and 2251.

3 The auction proceeds will be used to settle all quit rent, assessment arrears, auctioneer's fees, court fees and legal costs incurred by the Bank and the Intervenors from the date of this consent order to the successful sale or as may be incidental thereto.

PROVIDED THAT the legal costs to be incurred by the intervenors and the Bank and to be deducted from the auction proceeds of the respective lots are agreed at:

Successful Auction	*Fees (if action contested by Tan Ah Tong)*	*Fees (if action not contested by Tan Ah Tong)*	*Disbursements*
Grant No 7188	RM10,000	RM2,000	As per receipts
EMR No 2532	RM10,000	RM2,000	As per receipts
EMR No 2146) EMR No 2147) EMR No 2251)	RM10,000	RM2,000	As per receipts

Setting aside of stay orders:

(a) KUALA LUMPUR HIGH COURT
Originating Summons No S5–31–1641–87

To be applied by Messrs K L Wong & Lim and Messrs Shaharuddin Sham Sunder & Partners. Expenses to be deducted from successful auction of Grant No 7188.

Fees (if action Contested by Tan Ah Tong)
RM 10,000

Fees (if action not Contested by Tan Ah Tong)
RM 2,000

Disbursements (As per receipt)

(b) KUALA LUMPUR HIGH COURT
Originating Summons No S5–24–747–89

To be applied by Messrs K L Wong & Lim Expenses to be deducted from successful auction of EMR 2532.

Fees (if action Contested by Tan Ah Tong)
RM 10,000

Fees (if action not Contested by Tan Ah Tong)
RM 2,000

Disbursements (As per receipt)

Thereafter, the balance auction proceeds will be released forthwith upon receipt by the Bank or its agent thereof to the Intervenors who are parties to this order proportionately according to the area of their respective Lots as confirmed vide the first and second Schedules appended hereto over the total area of the land that were successfully auctioned provided their respective Lots are among the Lots successfully auctioned. The balance auction proceeds will belong to the Bank.

4 The intervenors herein surrender all their claims legal or equitable to their interests in the land only insofar as their case against the Bank herein in consideration of entering into the terms of this order with the Bank.

5 The parties hereto be at liberty to apply.

Dated the 13th day of March 1998
Sgd (Illegible)

GULAM MUHIADDEEN S M ABDUL AZIZ
TIMBALAN PENDAFTAR
MAHKAMAH TINGGI MALAYA
KUALA LUMPUR

.....
DEPUTY REGISTRAR/
SENIOR ASSISTANT REGISTRAR
HIGH COURT
KUALA LUMPUR

First Schedule

PARTICULARS OF INTERVENERS' TITLES
& INTERESTS IN LAND AFFECTING MASTER TITLES
VIDE GRANT 7188 OF TOTAL AREA OF ... KP

Land Purchasers	*Intervenors*	*Solicitors*	*Date/ Sales*	*Old Lot Nos*	*New Lot Nos (Mukim Ulu Klang, Selangor)*	*Total Area of Lot-Ownership*
KOH CHEE KEAN	first	M/s KL Wong & Lim	2/1/74	19	(4253) HS(D) 16211 PT 2289	8,415 kp
CHAW SAI MAN @ CHAO SZE MANG	12th	M/s KL Wong & Lim	28/1/74	10	(4249) HS(D) 16207 PT 2285 and	7,944 kp

A						(4269) HS(M) 1726 PT 2305	963 kp
B	LEE YOU KWAN @ LEE OOI KWAN (F)	13th	M/s KL Wong & Lim	2/1/74	11	(4250) HS(D) 16208 PT 2286	8,303 kp
C	CHAN SOI FOO @ CHAN MAY FOONG	15th	M/s Shaharuddin Sham Sunder & Partners		2 (Grant 94)	(4236) HS(D) 16194 PT 2272	11,549 kp
D	GOON KOON LEONG, Deceased now represented by Executrix, GOON CHOOI CHENG (F)	16th	M/s KL Wong & Lim	14/8/74	5	(4251) HS(D) 16209 PT 2287,	8,357 kp
E				14/8/74	6	(4246) HS(D) 16204 PT 2282 and	7,357 kp
F				20/11/74	19A	(4270) HS(M) 1727 PT 2306	9,290 kp
G	ONG CHONG EWE	17th	M/s KL Wong & Lim	18/12/74	11A	(4271) HS(M) 1728 PT 2307	9,155 kp
H	DMP LOWE	18th	M/s Kassim Tadin, Wai & Co	3/5/74	3 (Grant 94)	(4237) HS(D) 16195 PT 2273	10,440 kp
I	CONNIE SI LOWE	19th	M/s Kassim Tadin, Wai & Co	3/5/74	4 (Grant 94)	(4238) HS(D) 16196 PT 2274 and	10,369 kp

			3 /5/74	13 (Grant 94)	(4239) HS(D) 16197 PT 2275	8,360 kp	A
VASANTA KUMARI	20th	M/s Thevin Chand-ran & Wong	2/8/74	38	(4287)		B

Second Schedule

PARTIFCULARS OF INTERVENERS' TITLES & INTERESTS IN LAND AFFECTING MASTER TITLES VIDE EMER 2532, 2251, 2146 & 2147 OF TOTAL AREA OF ... KP

C

Land Purchasers	*Intervenors*	*Solicitors*	*Date/Sales*	*Old Lot Nos*	*New Lot Nos (Mukim Ulu Klang, Selangor)*	*Total Area of Lot-Ownership*	
CHONG SUE KHENG	2nd	M/s KL Wong &Lim	1/11/73	20	(4223) HS(M) 1723 PT 2269	7,840 kp	D
VIVIAN OH (F)	3rd	M/s KL Wong & Lim	1/11/73	21	(4234) HS(M) 1724 PT 2270	8,677 kp	E
PARAMJIT SINGH @ JAGJIT SINGH	4th	M/s KL Wong & Lim	21/1/75	24	(4229) HS(M) 1719 PT 2265 and	8,199 kp	F
			21/1/75	22	(4230) HS(M) 1720 PT 2266	8,194 kp	G
TAN KIM SENG	5th	M/s KL Wong & Lim	1/11/73	23	(4219) HS(M) 1709 PT 2255 and	8,194 kp	H
			1/11/73	11	(4202) HS(M) 1692 PT 2238	10,668 kp	I

A	FOONG MUN CHIEW	6th	M/s KL Wong & Lim	01/11/73	25	(4220) HS(M) 1710 PT 2256	8,604 kp
B	GOH HOON LIANG	7th	M/s KL Wong & Lim	01/11/73	27	(4221) HS(M) 1711 PT 2257	8,676 kp
C	LEOW BAN WAI	8th	M/s KL Wong & Lim	01/11/73	17	(4207) HS(M) 1697 PT 2243 and	7,753 kp
D						(4218) HS(M) 1708 PT 2254	2,712 kp
E	TEO CHIN HUAT	9th	M/s KL Wong & Lim	01/11/73	9	(4209) HS(M) 1699 PT 2245 and	10,254 kp
F						(4216) HS(M) 1706 PT 2252	556 kp

The notes of proceedings of the Originating Summons No F31–3627–86 were exhibited in encl 44 as exh 'A10' and the notes certainly gave an inkling as to what had transpired before NH Chan J (as he then was). I need to refer to pp 95–97 of the notes of proceedings which were recorded in these words:

G

NH Chan J: Are you saying that the bank cannot charge the land after they have taken in purchasers?

Ms Wong: But in the present case, the sale and purchase agreements would show that they were sold to purchasers free from encumbrances and in the same agreement it would also show that the third defendant was to deliver all the subsidiary titles upon subdivision and conversion.

H

NH Chan J: According to the Privy Council, the bank's suspicions have to be aroused. What is there to arouse the bank's suspicions of all these things?

I

Ms Wong: Normally conveyance of person would mean that they would have to make a search at the Land Office before agreeing to have the property charged to them.

NH Chan J: But if they did not do that, it is only negligence on the part of their lawyers. I can appreciate the point if after they have made a search and they have found all these caveats and looking at the sale and purchase agreements before them, there may (be) a case arising from the bank's suspicion. But if (their) own lawyers were negligent, there is no suspicion to arouse them.

Ms Wong: But the Privy Council, at p 210 says 'Knowledge of ... has brought home to him or his agents'.

NH Chan J: Where is the knowledge brought home to the banks or its agent?

Ms Wong: The purpose of the Torrens system is that one can make a search at the Land office.

NH Chan J: If that was not properly done, then it would be negligent on the part of the bank or its legal adviser.

Ms Wong: If it is negligence on their part, then they would have to take the consequence.

NH Chan J: If it is negligence, then they take the consequences under the tort of negligence.

Ms Wong: Can I take another date to argue that point?

Mr Wong: In fact this court observation of negligence has been decided by Lim Beng Choon J See p 34 of my latest bundle, at p 35, under held (2) and (3).

NH Chan J: Adjourned to 7 August 1993.

The undertaking as alluded to in the consent order dated 13 March 1998 in regard to the stay orders were accordingly discharged sometime in April 1998 and this was done so that the consent order could be enforced expeditiously.

After the order for sale dated 28 February 1989 by the Gombak land administrator and after the order for sale dated 5 September 1988 by NH Chan J (as he then was) were set aside, the present first defendant wasted no time and proceeded with the further directions for the sale of the relevant lands and the proclamation of sales were made in the press accordingly.

The latest position, in regard to the order for sale dated 28 February 1989 by the Gombak land administrator for master title EMR 2532 Lot 201, would be this: that the stay on the proclamation of sale issued at the instance of the first defendant was granted on the application by the plaintiff on 21 April 1999 by Hashim Yusof J vide Kuala Lumpur High Court Originating Motion No S3–21–28–99 but subject to 'Perintah Mahkamah bertarikh 21 April 1999 tidak menyekat pencelah yang dicadangkan dari memohon perintah-perintah yang sewajarnya'. This prompted the present third defendant together with the fourth, sixth and the fourteen defendants to apply to intervene in the said proceedings in order to set aside the plaintiff's stay order and their application was also fixed for final hearing before Hashim Yusof J on 20 September 2000. Meanwhile, Hashim Yusof J has since gone on transfer to Seremban High Court.

In regard to the order for sale granted by NH Chan J (as he then was) on 5 September 1988 in regard to Grant 7188 Lot 94, the present position may be stated as follows. The plaintiff had applied on 14 November 1998 for the stay of the auction before Hashim Yusof J in High Court Civil 3; and on 3 May 1999, the plaintiff also applied for a stay of the auction before James Foong J in High Court Civil 5 as well as for an interim stay before the then President of the Court of Appeal in the person of Lamin PCA. On 3 July 2000, the plaintiff also applied for a stay of the auction before Kamalanathan J in High Court Civil 2. It is interesting to note that all the stay applications were dismissed by the respective courts with costs against the plaintiff.

Just like the first defendant, the stand of the third to the fifteen defendants were that the plaintiff was pari delicto and was thus not entitled to the reliefs sought by him. The third to the fifteen defendants were advised by their counsel to say that there were no more issues required to be tried by this court. Alluding to the amended statement of claim in encl 31, the third to the fifteen defendants proceeded to rebut the contents of that document. Through their learned counsel by the name of Ms Wong Kim Lin, the third to the fifteen defendants challenged paras 17, 17.1 and 17.2 of the amended statement of claim in encl 31. It was quite apparent that the plaintiff in paras 17, 17.1 and 17.2 of the amended statement of claim in encl 31 averred that the third to the fifteen defendants were time barred — more than 12 years, from executing or enforcing the specific performance judgment dated 6 April 1987 granted by Siti Norma Yaakob J (now FCJ). It must be pointed out that the then Supreme Court (Lee Hun Hoe CJ (Borneo), Mohd Yusof Mohamed SCJ, and Gunn Chit Tuan SCJ) had on 27 March 1989 varied and affirmed the decision of Siti Norma Yaakob J (now FCJ). The Order of the then Supreme Court can be seen in exh 'GGC–5' of encl 81 and it was worded in this way:

IN THE SUPREME COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR (APPELLATE JURISDICTION)

SUPREME COURT CIVIL APPEAL NO 182 OF 1987

Between

1 GOON KOON LEONG	Appellants/
2 ONG CHONG EWE	plaintiffs
And	
1 TAN AH TONG	Respondents/
2 ASIALAND HOUSING DEVELOPMENT SDN BHD	Defendants

(IN THE MATTER OF THE HIGH COURT AT KUALA LUMPUR (Family and Property Division)

CIVIL SUIT NO 198 OF 1982

Between	
KOH CHEE KEAN	Plaintiff
And	
TAN AH TONG	Defendant

(CONSOLIDATED WITH CIVIL SUIT NOS F 199 OF 1982, F 200 OF 1982, F 201 OF 1982, F 202 OF 1982, F 203 OF 1982, F 204 OF 1982, F 205 OF 1982, F 206 OF 1982, F 268 OF 1982, F 285 OF 1982, F 237 OF 1983 AND F 238 OF 1983)

(AND FURTHER CONSOLIDATED WITH ORIGINATING SUMMONS NO F 1290 OF 1985)

(AND ALSO CONSOLIDATED WITH CIVIL SUIT NOS F 126 OF 1981, F 2 OF 1982, F 183 OF 1983, F 371 OF 1983 AND F 22–383–86)

CORAM: The Honourable Tan Sri Datuk Amar Lee Hun Hoe Chief Justice Borneo

The Honourable Dato Mohd Yusuff bin Mohamed SCJ

The Honourable Datuk Gunn Chit Tuan SCJ

IN OPEN COURT
THIS 27th DAY OF MARCH 1989

ORDER

THIS APPEAL coming on for hearing this day in the presence of Ms Wong Kim Lin of Counsel for the Appellants/plaintiffs and Mr Lee Pan Hai of counsel for the second Respondent/Defendant and Mr MS Murthi of Counsel for the first Respondent/Defendant AND UPON READING the Record of Appeal and the Memorandum of Appeal filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that the Judgment granted to the Appellants/plaintiffs on the sixth day of April, 1987 in the High Court of Malaya vide Civil Suit No 198 of 1982 consolidated with 10 other suits be varied as follows:

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(FAMILY AND PROPERTY DIVISION)

CIVIL SUIT NO 198 OF 1982

Between

KOH CHEE KEAN — plaintiff

And

TAN AH TONG — Defendant

(CONSOLIDATED WITH CIVIL SUIT NOS F 199 OF 1982, F 200 OF 1982, F 201 OF 1982, F 202 OF 1982, F 203 OF 1982, F 204 OF 1982, F 205 OF 1982, F 206 OF 1982, F 268 OF 1982, F 285 OF 1982, F 237 OF 1983 AND F 238 OF 1983.)

(AND FURTHER CONSOLIDATED WITH ORIGINATING SUMMONS NO F 1290 OF 1985)

(AND ALSO CONSOLIDATED WITH CIVIL SUIT NOS F 126 OF 1981, F 2 OF 1982, F 183 OF 1983, F 371 OF 1983 AND F 22–383–86)

The 6 day of April 1987 — In Open Court

AMENDED JUDGMENT

This action having been called on for hearing on the sixth day of April, 1987 before the Honourable Judge, Madam Siti Norma Yaakob in the presence of

Mr Krishna Aiyar of Counsel for plaintiff in Civil Suit Nos F 206/82, F 268/82, F 285/82, F 237/83 and F 238/83, Miss KL Wong of Counsel for plaintiffs in Originating Summons No F 1290/85, Miss Kathleen Chew of Counsel for plaintiff in Civil Suit No F 126/81, Mr Chandran Nair of Counsel for plaintiff in Civil Suit No F 2/82, Mr M Mathialagan of Counsel for plaintiffs in Civil Suit No F 183/83 and F 198/83, Miss SE De Costa of Counsel for plaintiffs in Civil Suit No F 371/83, Mr YH Chan of Counsel for plaintiff in F 22–383–86, Mr Sam Oon Sum Chuan of Counsel For the first defendant and Mr Lee Pan Hai of Counsel for the second defendant and upon hearing the evidence adduced by the parties hereto IT IS THIS DAY ADDUCED as follows:

1 The development costs to be charged shall be at the rate of $1.50 per square foot to be paid by the plaintiffs to the first defendants with adjustments to be made in the case of those plaintiffs who have already paid part of such costs, within a month from the date of receipt of the undertaking of the first defendant's Solicitors that they are ready and willing to deliver the relevant original grants of title document.

2 The relevant defendants shall, within a month hereof, demand payments of the conversion, the sub-division and survey fees from the plaintiffs in proportion to the area of the plaintiffs' subdivided lots calculated on the amount claimed by the Land Office, Gombak, in AL 1 and such demands shall be supported by the certificates from the defendants' Accountant as to the correctness of the sums demanded. The plaintiffs shall make payments within a month of receipt of such demands by the defendants.

3 Any other outgoings that the plaintiffs are liable to pay under their respective agreements shall also be settled within two (2) months from the date hereof provided that the first defendant's Solicitors and all person(s) claiming under and through them do and can confirm and/or give a letter of undertaking that they will forward the relevant original grants of title together with the duly executed memoranda of transfer in respect of the plaintiffs' lots.

4 Provided that all the above dues have been settled by the plaintiffs in full within the times limited, the relevant defendants and all person(s) claiming under and through them in particular with actual custody of the relevant original grants of title shall forthwith deliver up and transfer the respective four (4) lots to the plaintiffs within a month of demand from the plaintiffs viz Lots 4251, 4246, 4270 and 4271 respectively as appear highlighted in green in the exhibit marked as 'AB 1' appended hereto as due to the plaintiffs under the respective Sale and Purchase Agreements for sale thereof to the plaintiffs for a settlement in specific performance of this matter, free from all encumbrances and the expenses for such transfers shall be borne by the plaintiffs.

5 The first defendant shall also refund to the plaintiffs in Originating Summons No F 1290/85 the amounts representing the area in difference of the two four (4) lots in toto an area of 8,441 square feet in difference, which had been reduced in area upon sub-division at the rate of $1.80 per square foot, such refund to be made within a month hereof.

6 The defendants do pay the costs of the plaintiffs' actions.

7 The second defendant shall also agree to the plaintiffs' entitlement to the said four (4) lots of land as purchased by them whereof specific performance be granted in the plaintiffs' favourr viz Lots No 4251, 4246, 4270 and 4271 respectively as appear(ed) in exhibit marked 'AB1'

adduced as evidence in Suit No 198 of 1982 and appended hereto which had been consolidated with this Originating Summons and with 18 other suits provided that the other two (2) land purchasers, Mr Lee You Kwan and Mr Koh Chee Kean the purchasers of corresponding lots of Tauk Lot Nos 11 and 19 (the plaintiffs in this case purchased Tauk lot Nos 11A and 19A) are still abiding by their claims in the said consolidated suits to Lots Nos 4250 and 4253 respectively.

Dated the sixth day of April 1987.

Sgd Illegible
.....
Senior Assistant Registrar
High Court, Kuala Lumpur

AND IT IS FURTHER ORDERED that the sum o RM$500 deposited into court as security for costs of the Appeal be refunded to the appellants/ plaintiffs.

AND IT IS LASTLY ORDERED that the costs of this appeal be costs to be borne by the first respondent/defendant but there shall be no order as to costs as against the second respondent/defendant.

GIVEN under my hand and the Seal of the court this 27th day of March, 1989.

Sgd Illegible
.....
SENIOR ASSISTANT REGISTRAR
SUPREME COURT MALAYSIA
KUALA LUMPUR

By way of a rebuttal Ms Wong Kim Lin submitted, quite rightly, that at all material times the third to the fifteen defendants have acted diligently in enforcing the specific performance judgment pursuant to ss 4 and 26 of the Specific Relief Act 1950 against both the plaintiff and the first defendant. She contended that each and every time leave was granted to the third to the fifteen defendants to intervene into all the matters pertaining to the subject lands vide Kuala Lumpur High Court Originating Summonses Nos S5–24(31)–1641–88, S5–24–747–89, F31–3627–86 and in the Shah Alam High Court Originating Summons No 25–67 of 1994, and for these reasons she rightly submitted that the limitation period in regard to time did not apply at all.

Paragraph 16 of the amended statement of claim in encl 31 when read together with para 7.4.4. thereto gave the picture that the third to the fifteen defendants have surrendered their rights under the specific performance judgment when they entered into the consent order with the first defendant and, consequently, it was said that they have no more rights against the plaintiff at all. This was the submission advanced by Mr Ngeow Yin Ngee who acted for the plaintiff. However, Ms Wong Kim Lin who acted for the third to the fifteen defendants took exception and she referred to para 7.4.4. of the statement of defence of the third to the fifteen defendants by way of an answer and that paragraph was worded in this way:

A 7.4.4. the third to 15th defendants deny that para 7.4.4 of the amended statement of claim is the correct interpretation of cl 4 of the Consent Order dated 13 Mac 1998. The said defendants shall refer to the full effect of the said cl 4 which reads as follows:

> 'The Intervenors herein surrender all their claims legal or equitable to their interests in the land only insofar as their case against the Bank
B herein in consideration of entering into the terms of this Order with the Bank'.

The consent order dated 13 March 1998 as reproduced earlier included an enforcement order under s 26(b) of the Specific Relief Act 1950 and it would be activated in such circumstances when the plaintiff was found to
C be unable to deliver free and clean titles to the third till the fifteen defendants. It was pointed out that the relevant clause specifically said that in lieu of the land titles to be claimed from the first defendant, the third to the fifteen defendants will only confine their claim to their share in the proceeds of the auction sale in so far as their claims against the first defendant was concerned. It was the stand of the third to the fifteen
D defendants that at no time did they surrender their rights under the specific performance judgment as against the plaintiff pursuant to the terms of the consent order dated 13 March 1998.

In his amended statement of claim in encl 31 particularly at paras 7.5 to 7.8 and at paras 11 to 11.4, the plaintiff averred as against the first
E defendant that the Order for sale was defective on account of the master title having been subdivided into subsidiary titles and that no fresh charges have been re-executed for the subsidiary titles. Ms Wong Kim Lin by way of a rebuttal pointed out quite correctly that the subsidiary titles have been properly and correctly re-issued by the second defendant with the original charge re-indorsed upon each subsidiary title as a continuation of the
F interests indorsed on the master title pursuant to and under s 202 of the National Land Code 1965 ('the NLC'). Once registered the subsidiary titles became a continuation of the master title and that being the case the Order for sale over the master title would also affect the subsidiary titles as well. It was strenuously argued by Ms Wong Kim Lin that there were no infringements of the provisions of the NLC and that once the Order for sale
G had been perfected the court was said to be functus officio. For these varied reasons, Ms Wong Kim Lin for the third to the fifteen defendants prayed that the plaintiff's amended statement of claim in encl 31 be struck out with costs.

It was the submission of Ms Wong Kim Lin that the plaintiff's amended
H statement of claim in encl 31 was founded on the substantive ground of 'illegality' provided the plaintiff was able to bring himself within the '*special exception*' of the *Badiaddin*'s principle (referring to the case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC)) or within the 'exceptional circumstances' of the *Hock Hua Bank*'s principle (referring to the case of *Hock Hua Bank Bhd v Sahari bin Murid*
I [1981] 1 MLJ 143) otherwise the plaintiff was said to be forever estopped from bringing up any one or more of the issues as alluded to in the amended statement of claim as seen in encl 31. It would thus be appropriate to

examine these cases at some length. First, I shall consider *Hock Hua Bank*'s case. That was a case where the learned judge had made an order for sale in a foreclosure proceeding and that order was made after hearing all the parties and was made despite a claim of non est factum. That order was also made despite the allegations of fraud and forgery by the respondent. The order was then drawn up and perfected. There was no appeal against the said order. The respondent, meantime, applied to set aside the judgment and the application was refused. Once again and at a subsequent stage the respondent applied to set aside the previous orders. The learned judge then proceeded to set aside his order and the appellant then appealed.

The Federal Court held that the learned judge was functus officio. Chang Min Tat FJ writing the judgment for the Federal Court had this to say about the approach of the learned judge (see pp 143–144 of the report):

> He did not consider that he was *functus officio*. Nor that the application to set aside the order was made in the same proceedings and after the order had been drawn up. He did not appear to realize that the order was made on an inter partes application. He rejected the contention of counsel for the chargee that the only way to set aside such an order was by a fresh action if, inter alia, grounded on fraud. He thought that since the matter had not been adjudicated and the court had not pronounced a judgment upon the merits or by consent, he had the power to do what he did. He gave as his authority the case of *Evans v Bartlam* [1937] AC 473 and he cited the oft-quoted dictum of Lord Atkin therein on a judgment obtained by a failure to follow any of the rules of procedure.
>
> But though he himself observed that in this dictum Lord Atkin was discussing the jurisdiction of the judge to set aside a judgment obtained by default, he failed to see that in this case the order was not obtained because of the default of the other party. He had the same material before him at the first foreclosure proceeding and quite clearly he should have considered himself *functus officio* after having considered the contentions raised at this proceeding and refused to do anything about it on the ground of lack of jurisdiction and he should have left it to the respondent to commence a fresh action to set aside the foreclosure order on the ground of fraud. The right practice was pointed out to him and his attention was drawn to the cases directly in point. Unless he could distinguish them, he was bound by them.
>
> Clearly, the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O 28 r 11 of the Rules of the Supreme Court 1957 (O 20 r 11 of the Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St Nazaire Co* 12 Ch D 88, *Kelsey v Doune* [1912] 2 KB 482; *Hession v Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v Neotia & Co* [1918] AC 888 and *Jonesco v Beard* [1930] AC 298. The hearing of the action will in a proper case be expedited: *Smith v Peizer* 65 SJ 607.
>
> For these reasons, we allowed the appeal with costs and restored the original order made in the foreclosure proceeding.

A Next, I will consider *Badiaddin*'s case. In that case, the facts may be stated as follows. There the appellants were the registered co-owners of a piece of Malay reservation land ('land'). The appellants' business associate by the name of Ismail bin Omar ('Ismail') was in need of some funds. The appellants agreed to assist Ismail and they did so by charging their land to the respondent to secure a loan advanced by the respondent to Ismail. It was
B a simple transaction. But Ismail breached the loan agreement and the respondent foreclosed the third party security and obtained an order for sale of the land. The appellants applied to the High Court for a declaration that the charge as well as the order of sale were invalid because it contravened the Malay Reservations Enactment (FMS Cap 142) ('the Enactment'). In
C due course, to be exact, on 21 March 1988, the High Court granted the declaration sought for and in respect of the respondent's summons filed in the same proceedings where s 66 of the Contracts Act 1950 ('the Act') was invoked, the learned judge also made an order directing the appellants to repay all monies lent to Ismail ('the 1988 order'). On 8 October 1990, the same learned judge made another order declaring that the appellants had
D received an advantage or benefit directly from the respondent and the learned judge also ordered that the land be sold and the proceeds of sale be utilized to pay the balance outstanding on the loan made to Ismail ('the 1990 order'). The appellants then proceeded afresh to have the 1990 order declared null and void and to have it set aside on the ground that it contravened s 13 of the Enactment. The appellants argued that they were
E entitled to the remedy ex debito justitiae without the need to comply with the appeal procedure. The respondent argued that res judicata and estoppel precluded the appellants from questioning the validity of the 1990 order. Another learned judge ruled on 22 September 1995 that it would be unjust to estop the appellants from challenging the 1990 order by reference to res
F judicata or any other branch of the doctrine of estoppel because the 1990 order was plainly invalid, it having been made in contravention of an express provision of the written law ('the 1995 order'). The respondent then appealed to the Court of Appeal (see [1996] 3 MLJ 621) and the Court of Appeal allowed the appeal on the sole ground that the High Court was functus officio and had no jurisdiction whatsoever to set aside the 1990
G order irrespective of any illegality in the order. The appellants appealed. The Federal Court allowed the appeal and upheld the 1995 order. Mohd Azmi FCJ writing a separate judgment had this to say at pp 410–411 of the report:

> Having properly declared in the March 1988 order that the charge and the order of sale were null and void, it is unthinkable that in October 1990, the
H same judge could turn turtle by ordering the same land to be sold by public auction to satisfy a judgment arising out of the same illegal transaction purportedly under s 66 of the Contracts Act. Clearly, the 1990 order of sale of the reserve land which had the effect of an attachment in execution of a judgment was null and void being in violation of the prohibition imposed by s 13 of the Malay Reservations Enactment which provides:
>
I > 'No Malay holding shall be attached in execution of a decree or order of any court unless the suit or proceeding in which such decree or order was made was instituted before the commencement of this Enactment.'

As adverted to earlier, it is also unfortunate that the Court of Appeal had denied itself of the opportunity to consider the appellants' complaint on the merits particularly in relation to the applicability of s 66 to the facts and circumstances of this case, where the appellants/chargors were not privy to the loan agreement between the respondent and the borrower Ismail. Could Mustapha Hussain J invoke the provision of s 66 to order repayment of RM300,000 under the loan agreement which was still outstanding under the loan given by the respondent to Ismail, and also to order the sale of the appellants' Malay reservation land by public auction to satisfy the RM300,000 judgment, notwithstanding his earlier final order declaring null and void the charge and the order of sale of the same reserve land? Obviously not. Clearly, the real effect of the October 1990 order was to reverse the earlier March 1988 order between the same parties, under the guise of a claim for a remedy under s 66, which provides:

> 'When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.'

It is necessary to bear in mind that s 66 of the Contracts Act does not create a cause of action. It only confers a discretionary remedy in the nature of restitution to be exercised by the court within the ambit of the section and within the principles of the law of contract. First, it must be borne in mind that the respondent/chargee had entered into two separate and distinct agreements with two different persons — the first with Ismail (the borrower) and the second with the appellants/chargors (the landowners) who in compliance with the requirement of the respondent gave a third party security for the loan by granting the respondent a registered charge over their Malay reservation land. From the loan agreement and the charge documents, the appellants/chargors were not a beneficiary of the loan. Neither Ismail nor the respondent was under any contractual obligation to give any part of the loan to the appellants, but there was evidence that Ismail did give some money from the disbursement of the loan to the appellants. In my view, since the appellants/chargors were not party to the loan agreement, s 66 cannot be invoked against them. Under that section, the party who is bound to restore any advantage received or to make compensation for such advantage should be construed as 'any person' who is a party to the agreement and has received any advantage pursuant to the terms or conditions of the invalid contract, but not otherwise. To extend the meaning of 'any person' in s 66 to strangers to the agreement would be in violation of elementary principle of contract. Since the loan agreement was strictly between the respondent and Ismail, the court had no jurisdiction to order the appellants to pay under s 66 merely because he had received a fraction of the loan money from Ismail. The appellants were not a party to the loan agreement and as such there was no question of repayment by them either by way of restitution of benefit or compensation. As indicated earlier on, s 66 does not create a cause of action. It provides an equitable remedy which the court can order in favour of an innocent party against another party to an agreement who had received benefits under it although the agreement is found unenforceable by law. In this case, the appellants/chargors were not a party to the loan agreement. Their only role was to provide security for the loan, without any right to any money payable under the loan or the right to tell the respondent to whom or in what manner the loan should be disbursed. In accordance with the terms of the loan agreement, the whole loan of RM400,000 was in fact disbursed on the sole instruction of Ismail, the

borrower. The fact that Ismail had used the loan money received from the respondent to pay other people, including the appellants, could not make them parties or privies to the contract so as to enable the court to bring them within the ambit of s 66. The principle of tracing in the law of trust should not be applied in ordinary relationship between a financier and its customer. It would be absurd for instance to hold that if part of the loan had been used to settle Ismail's grocery bills then the grocer could be ordered to restore the money to the respondent under s 66.

At p 412 of the report, his Lordship Mohd Azmi FCJ rounded up the matter by saying:

> To summarize, Mohd Noor Abdullah J was correct in law in exercising the inherent jurisdiction of the High Court to set aside ex debito justitiae the October 1990 order of Mustapha Hussain J for the following reasons. The third party charge having been lawfully declared invalid by the High Court in 1988 by virtue of s 8(i) of the Enactment, the principal order made in 1990 for restitution of benefits or compensation against the appellants which in effect was an order to enforce an invalid third party security for repayment of loan purportedly decreed under s 66 of the Contracts Act 1950 was made without or in excess of jurisdiction, and in consequence, the order of sale of the appellant's land could not be sustained. Secondly, the sale order itself was in effect an order of execution to satisfy a judgment by the sale of the reservation land by public auction or private treaty (which should be construed in the circumstances as an order of attachment in execution of the said judgment) and therefore contravened the prohibition imposed by s 13 of the Enactment, a legislation especially permitted and protected by art 89 of the Federal Constitution not only relating to reservation land existing before Merdeka Day, but also in respect of new reservation land.

Both Peh Swee Chin FCJ and Gopal Sri Ram JCA wrote concurring judgments. I shall, in the later part of this judgment, allude to this case once again.

Enclosure 64

In advancing its appeal in encl 64 the first defendant relied on three main arguments, namely:

(1) that the plaintiff's claim was tainted with illegality;

(2) that the plaintiff's claim was governed and constrained by the doctrine of res judicata; and

(3) that the plaintiff's claim was mala fide and an abuse of the process of the court.

Enclosure 82

As alluded to earlier, the third to the fifteen defendants joined in the affray. They too sought to strike out the plaintiff's amended statement of claim in encl 31. They too relied and joined issue with the first defendant in raising the same three main arguments as alluded to above.

I shall now examine the three main arguments on a separate basis.

Illegality A

In relation to enclosure 64

The plaintiff's amended statement of claim in encl 31 in clear terms set out the background facts of the whole case. It hinged entirely on Asialand borrowing money under a loan from the first defendant and that loan was B secured by the five master titles belonging to the plaintiff. The amended para 11A of encl 31 was worded in this way:

> 11A Selanjutnya atau secara alternatif Plaintif menyatakan bahawa Gadaian Perserahan No 9657/77 Jilid 18 Folio 110 dan Memorandum Gadaian Perserahan No 9658/77 Jilid 18 Folio 111 C ke atas tanah-tanah Geran 7188 adalah batal dan tidak sah di sisi undang-undang atas sebab kelanggaran undang-undang ('illegality') seperti berikut:
>
> 11A.1 Gadaian-gadaian tersebut telah dilaksanakan sebagai sekuriti untuk pinjaman yang didahulukan kepada Asialand Housing Development Sdn Bhd ('Asialand'); D
>
> 11A.2 Gadaian-gadaian ini telah dilaksanakan pada 1977. Pada masa perlaksanaan gadaian-gadaian ini, Asialand Housing Development Sdn Bhd tidak mempunyai lesen pembangunan seperti yang dikehendaki di bawah Akta (Mengawal dan Melesen) Pemaju Perumahan 1966.
>
> 11A.3 Memandangkan perkara ini gadaian-gadaian ini ke atas tanah-tanah E Geran 7188 adalah batal dan tidak sah.

and the thrust of this amendment was that the plaintiff was saying that the charges created by him in favour of the first defendant to secure the loan given to Asialand of which the plaintiff was the chairman, director and major shareholder were illegal because at that time, his company, Asialand, F did not have a development licence and was thus in breach of the Housing Developers (Control and Licensing) Act 1996. In short, the plaintiff was saying that because of this illegality, the charges were invalid and he wanted the title back referring of course to master title vide Grant 7188 Lot 94.

The very same argument was repeated by the plaintiff in the amended para 15A of encl 31 and this was principally aimed at master title vide G EMR 2532 Lot 201.

In so far as the other three master titles were concerned, namely, EMR 2146 Lot 349, EMR 2147 Lot 350 and EMR 2251 Lot 515 the relevant paragraph in encl 31 would be para 15 and this paragraph remained unamended. This meant that the plaintiff had not amended his Statement H of Claim to raise the issue of illegality in relation to these three master titles. But the first defendant held strongly to the view that these three master titles were also tainted by the same illegality and this can be seen in Yeo Khay Ann's affidavit in encl 44 at paras 3, 4 and 5 thereof.

It is interesting to note that the plaintiff's affidavit in reply in encl 56 made no denial that in respect of all the five master titles and at the time the I charges were created, Asialand had no development licence at the material time.

Reverting back to the amended statement of claim in encl 31, particularly the reliefs in prayers 1, 1A, 1B, 2 and 3 thereof, it cannot be denied that these reliefs that were sought relate to master title Grant 7188 Lot 94. Briefly, in prayer 1 of encl 31 the plaintiff sought for a declaration that the Order for sale dated 5 September 1988 relating to the land held under the master title Grant 7188 declared null and void. While prayers 1A and 1B of encl 31 were related to the issue of illegality. Prayer 2 of encl 31 sought for a declaration that the memorials registered by the second defendant — Pentadbir Tanah Daerah Gombak, on the subdivided titles to the master title Grant 7188 Lot 94 were null and void. Prayer 3 of encl 31 sought for an Order of cancellation of the charge memorials on the subdivided titles of the master title Grant 7188 Lot 94. While prayer 4 of encl 31 sought for a declaration that the Order for sale declared by the second defendant on 28 February 1989 on the four master titles as alluded to earlier be declared null and void. Prayers 5 and 6 of encl 31 were consequential to prayer 4 and which sought for a declaration that the memorials on the four master titles be cancelled. Prayer 7 of encl 31 sought an order that the first defendant to return within 14 days the land titles held under master titles EMR 2146 Lot 349, EMR 2147 Lot 350, EMR 2251 Lot 515, EMR 2532 Lot 201 and Grant 7188 Lot 94 to the plaintiff.

The main thrust and purport of the plaintiff's amended statement of claim in encl 31 was that the charges were null and void because of illegality and, consequently, the plaintiff wanted the first defendant to return all the title deeds to him.

But the first defendant also held onto the notion that the plaintiff too was tainted with illegality and for that very reason it was submitted that this court ought not to assist the plaintiff in his claims and that the plaintiff's claims ought to be struck out on the ground of illegality.

On the other end of the scale, the plaintiff's affidavit in reply in encl 56 was of no help at all. Paragraph 4 of encl 56 did not provide an answer, nor was it a denial or a rebuttal on the issue of illegality in regard to the involvement of Asialand on the five master titles. It must be emphasized that para 4 of encl 56 did not reply to specific paragraphs of encl 44 but rather it was more in the nature of a general averment. In its original text, para 4 of encl 56 was worded in this way:

> Saya adalah pengarah di dalam *Asialand Housing Development Sdn Bhd* (kemudian daripada ini dirujuk sebagai 'Asialand') dari 9 Oktober 1975 sehingga 25 Januari 1985 dan pemegang saham Asialand dari tahun 1975–1983.

While para 5 of encl 56 spoke of the Shah Alam High Court Originating Motion No 25–67–94 which had been withdrawn and in its original text it was worded in this way:

> Tindakan Mahkamah Tinggi Shah Alam melalui Usul Pemula No 25–67–94 telah ditarik balik dengan kebebasan memfailkan(nya) semula.

At this juncture, it would be ideal to compare, briefly, encl 44 with that of encl 56. In encl 44, the first defendant speaking through Yeo Khay Ann

alluded to the point on illegality in paras 3, 4 and 5 thereto. Whereas the plaintiff in his affidavit in reply in encl 56 merely gave oblique replies in paras 4, 5 and 6 thereto. Without a doubt, there was evasiveness on the part of the plaintiff in committing himself to the facts on record. It can safely be said that the issue of illegality as averred by the first defendant was not rebutted by the plaintiff and that being the case the full rigours of the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 must be brought to bear against the plaintiff.

I was asked not to extend a helping hand to the plaintiff who had founded his cause of action on an illegal act. In this direction, the speech of Lord Mansfield in *Holman v Johnson* [1775–1802] All ER Rep 98 must be referred to. There Lord Mansfield in refined language said at p 99 of the report:

> No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted.

and continuing at p 99 of the report, his Lordship said:

> It is on that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally (at) fault, potior est conditio defendentis.

Devlin LJ, on the other hand, distinctively defined the effect of illegality on a contract in the case of *Archbolds (Freightage) Ltd v S Spanglett Ltd (Randall, third party)* [1961] 1 QB 374 at p 388, [1961] 1 All ER 417 at p 424, in these words:

> The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.

In *Siow Kwang Joon & Anor v Asia Commercial Finance (M) Bhd* [1996] 3 MLJ 641, I considered the issue of illegality of contract despite the fact that it was not pleaded nor raised during the course of the trial before the sessions court judge. At p 663 to p 664 of the report this was what I said:

> Lindley LJ in *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 made general observations on the issue of illegality of contract in the following words:

'Ex turpi causa non oritur actio. This old and well-known legal maxim is founded on good sense, and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman v Johnson* Cowp 343.'

In *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416, the court had to consider the question of the reception of a fresh point not argued in the court below nor set out in the pleadings. The appellants there wanted to introduce and argue a fresh point that they, as owners of a plank house, had an equitable interest in the land and were therefore not trespassers. In rejecting the application, Mohd Azmi SCJ (now FCJ), on behalf of the court, stressed the importance of adhering to pleadings at p 418 in this way:

'Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v Hamilton* [1983] 1 AC 191 at p 233:

"Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ..." '

The new point raised in *Muniandy* was not on illegality as was raised in the present appeal.

The Federal Court in the case of *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 considered the issue of illegality. Ismail Khan CJ (Borneo) writing for the Federal Court had this to say:

'The point whether the court can take cognizance of a point of illegality, whether pleaded or not, has been the subject of numerous decisions. I need only refer to the case of *Snell v Unity Finance Ltd* [1963] 3 All ER 50 at p 55 where most of the authorities were dealt with. In that case, Willmer LJ referred with approval to the propositions set out by Devlin J in *Edler v Auerbach* [1949] 2 All ER 692 who, following the reference to *North-Western Salt Co United v Electrolytic Alkali Co Ltd* [1914–15] All ER Rep 752, said at p 697:

"That case authorizes, I think, four propositions: first, that where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, that where, as here, the contract is not ex facie illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that where unpleaded facts, which, taken by themselves show an illegal object, have got in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on

them unless it is satisfied that the whole of the relevant circumstances are before it, but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not." ' A

In *Narayanan v Kannamah* [1993] 3 MLJ 730, I had occasion to say at p 734:

'The court is empowered at its will to adjudicate the case according to the law even though the issue is not pleaded. Thus, where a statute makes a particular contract or class of contracts void, the court will refuse to allow an action to be maintained thereon, even though the objection is not pleaded and the parties do not desire to rely on it (see *Royal Exchange Assurance Corp v Vega* [1902] 2 KB 384, where the contract was invalid under s 93(3) of the Stamp Act 1891). But if, like the present appeal, the illegality is patent on the face of the statement of claim, it would be a good ground for an objection in point of law and this court is entitled to act upon it (*North Western Salt Co v Electrolytic Alkali Co* [1914] AC 461).' B C

Further down the same page in the same judgment, I said:

'Bankes LJ succinctly said in *Re Mahmoud & Ispahani* [1921] 2 KB 716 (at p 726) that there is no qualification to 'the established rule of law that the court will never lend its aid in the enforcement of a contract which is ab initio illegal.' D

Finally, Gopal Sri Ram JCA in *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141 said:

'We accept as beyond argument that illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the court before whom the action is being tried, the court, upon being satisfied that the transaction is indeed illegal, is obliged to act upon it. See, *Natha Singh v Syed Abdul Rahman & Anor* [1962] MLJ 265; *Nasib Singh v Ramasamy* [1969] 1 MLJ 211.' E

Mr Ibrahim Hashim alerted me on the issue of illegality and even though it was not argued before the trial court nor pleaded, yet I am obliged, and I so do, to consider the illegality issue. I ruled that the contract of guarantee which was in fact a contract of indemnity contravened s 2 of the Hire Purchase Act 1967 and it was void, illegal and of no effect. F

For the reasons adumbrated above, I had no choice but to allow the appeal of both appellants with costs. G

Here, in adjudicating encl 64, the issue of illegality was put to the forefront by the parties and that issue took centre stage, so to speak.

Illegality was also considered by the Singapore Court of Appeal in the case of *Patriot Pte Ltd v Lam Hong Commercial Co* [1980] 1 MLJ 135. There at p 137, Wee Chong Jin CJ had this to say: H

It has been settled law since *Foster v Driscoll* [1929] 2 KB 470 that if a party to a contract actively engages in an illegal adventure to get goods into a country in breach of the revenue laws of that country, the court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract. I

Still in Singapore, its High Court in *Suntoso Jacob v Kong Miao Ming & Anor* [1984] 2 MLJ 95 refused to enforce a transaction where a public

authority had been misled. At p 97 of the report, Lai Kew Chai J, in dismissing the plaintiff's claim remarked that:

> The plaintiff is therefore confronted with the principle stated a long time ago by Lord Mansfield: 'No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act', see *Holman v Johnson* (1775) 1 Cowper 341; [1775–1802] All ER Rep 98. A similar situation had arisen in *Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143. I have no doubt that the plaintiff had practiced a deception on the Registrar of Singapore Ships. To the plaintiff, I have to say: 'Let the said shares lie where they fall'.

It is certainly within my province to adjudicate on the issue of illegality. In fact, I am obliged to consider the issue of illegality once that issue had been raised by the parties thereto (*Nasib Singh v Ramasamy* [1969] 1 MLJ 211; *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] MLJ 281; and *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161).

Still within the scope and province of illegality, Mr Leong Wai Hong of counsel for the first defendant argued rather convincingly that Asialand had contravened the statutory provisions of the Housing Developers (Control and Licensing) Act 1966 (Revised 1973) (Act 118) ('the 1973 Act'). Section 5(1) of the 1973 Act enacts as follows:

> No housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under this Act.

And this would be followed by s 18 of the 1973 Act which enacts as follows:

> Any housing developer who:
>
> (a) in contravention of s 5(1) engages in, carries out, or undertakes housing development without having been duly licensed under that section;
>
> shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than ten thousand ringgit but which shall not exceed one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

It would be apparent that by virtue of s 5(1) of the 1973 Act, it is mandatory for a housing developer to be in possession of a valid licence before that housing developer undertakes any housing development. SY Kok in his book entitled *Law Governing The Housing Industry* (1998 Ed) had this to say of the 1973 Act (see pp 84–85 of the textbook):

> The preamble of the Act has expressly stated that the purpose of the Act is to control and licence the 'business of housing development'. The Act has been primarily designed to protect bona fide purchasers of modest means from rich and powerful developers (*SEA Housing Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 at p 34 (FC)). Pursuant to these aims and objectives of the Act, its subsequent rules and regulations have been tailored to control and regulate the 'business' of housing development; not to stifle it. In other words, neither the Act nor its rules and regulations have ever been designed to prohibit the sales and purchases of houses and/or flats in a free market.

Further down the same page and continuing to p 86 of the textbook, the learned author had this to say:

Section 5(1) of the Act, in explicit language, enacts: A

> 'No housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under this Act.'

Thus, when the Act came into force on 29 August 1969 no person, body or persons, corporate body, firm or society (by whatever name these may be described) (see the definition of a 'housing developer' in s 3 of the Act) may B engage in, carry on, undertake or caused to be undertaken the *business of housing development* unless he, they or it has or have been issued with a developer's licence under s 5(1) of the Act. Section 5(1) is directed at a group of persons; it is not to protect housing developers but to control and regulate their businesses of housing development through licensing. By virtue of the re-definition of the term 'housing development', not only are housing developers C required to obtain licences, builders and contractors, under certain given circumstances, are deemed by the re-definition to be engaged in, carried on or undertook the business of housing development and, therefore, are required to obtain developer's licences notwithstanding that they are not developers in the ordinary sense of the word because of the absence of the fundamental element of proprietorship of the project land. Section 5 does not prohibit the D sale and purchase of houses or flats. It is not designed to stifle the housing industry.

Apparently, the scope of s 5 has not been touched on directly by any of the Malaysian cases but in a Singapore case on similar provisions in the Housing Developers (Control & Licensing) Act of 1965 (Cap 250); s 4, which regulates the granting of housing developers' licences in Singapore was E commented on by Chua J in the High Court case of *Mary-Anne Arrichiello v Tanglin Studio Pte Ltd* [1981] 2 MLJ 60, HC Singapore where, at p 63, his Lordship said:

> 'The buying and selling of houses or flats is not a prohibited activity under the law. Anyone (except foreigners in certain cases) can buy and sell houses and flats in Singapore. The act seeks to control housing F development not the sale and purchase of properties ... . Section 21 of the Act is merely seeking to control, amongst other things, the mode of performance of the contract of sale by housing developers and it seeks to do this through a licence granted to the developer. It does not in any way prohibit the formation of an agreement...
>
> The Act is merely prescribing a method of performance by the G housing developer for the protection of a class of persons — to protect purchasers as far as possible from the risk of exploitation. The Act does not in any way prohibit the making of contract for sale and purchase of flats. The licence that the Act requires is a licence to develop.'

Thus, the local Act too seeks to protect a class of persons viz innocent and sometimes weak purchasers from the possible risk of exploitation. Therefore, H s 5(1) is introduced to provide the statutory means to control and regulate the housing industry. One of such means is to license the developers so as to separate the bogus from the genuine developers. Therefore, any housing developer who, in contravention of s 5(1) engages in, carries out, or undertakes the business of housing development without having been duly licensed under that section will be guilty of an offence and will be exposing I himself, themselves or itself to criminal prosecution by the Public Prosecutor via summonses (*PP v Annamaly all Narayanan* [1989] 1 MLJ 45). Upon conviction, the offender will be liable to a maximum fine of RM100,000 or a

minimum fine of RM10,000 or to imprisonment for a term not exceeding five years or both. (In the earlier statutory provisions, the maximum fine was pegged at RM20,000. However, with the amendment made to the Act in 1988, the maximum fine was raised to RM100,000. This increase in the quantum is perhaps a reflection of the seriousness of the offence of carrying on the business of housing development without a proper licence).

Finally, at p 87 of the textbook, the learned author said:

> Section 5(2) of the Act seeks to prevent bogus developers from misleading the public by holding out to be housing developers when they are not licensed under s 5(1). This subsection is designed by Parliament to prevent members of the public from being lured or trapped by bogus or fly-by-night developers and consequently, be cheated of their hard-earned monies. Thus, s 5(2) has been enacted to read:
>
> > 'Except with the written consent of the Controller no housing developer other than a licensed housing developer shall assume or use in relation to his business or any part of his business the words "housing developer" or any of its derivatives or any other word or words indicating the carrying on of the business of housing development.'

From the available evidence, it would be correct to say that Asialand had no valid licence issued under the 1973 Act and that being the case, Asialand was opened to prosecution under s 18 of the same Act. Just like the case of *Suntoso Jacob v Kong Miao Ming & Anor* where the plaintiff there had practised a deception on the Registrar of Singapore ships, here too the present plaintiff had deceived the Controller of Housing appointed under s 4 of the 1973 Act by undertaking housing development without a licence. This was certainly a case where this court would not lend its aid to the plaintiff who had founded his cause of action upon an immoral or an illegal act. This was my judgment and I so hold accordingly.

Illegality

In relation to encl 82

It was argued by Ms Wong Kim Lin that *Badiaddin*'s case should be read with the narrow interpretation of creating that class of cases with 'special exception' which attracts the 'unlimited jurisdiction' of the court to attack and strike down judgments or orders by way of collateral proceedings. She even submitted that not every case of an alleged 'illegality' like the present case could the party invoke the *Badiaddin*'s principle. According to her the illegality issue in the *Badiaddin*'s case was exceptional and that being the case it required exceptional jurisdiction of the court to handle the issue. It must be borne in mind that the Federal Court in *Badiaddin*'s case was called upon to strike down the 1990 order of the court of the first instance which allowed the very illegal objects and intents which had been expressly prohibited by s 13 of the Enactment, namely, the Malay Reservations Enactment (FMS Cap 142). The court of the first instance in Badiaddin's case in handing down the 1990 order was certainly powerless to order acts that ran contrary to the Enactment, namely the Malay Reservations

Enactment (FMS Cap 142) and for that reason it was not surprising that the Federal Court allowed the appeal and upheld the 1995 order. Gopal Sri Ram JCA writing a separate judgment in Badiaddin's case aptly said at p 426 of the report:

> It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v Robertson* is certainly not authority for the latter proposition. I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular thought it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.
>
> As Abdoolcader J observed when delivering the judgment of the former Federal Court in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39:
>
> > 'The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p 736) that: "it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside".'

I venture to say that only in exceptional situations can the court strike down its own orders in order to restore its good name. In such a situation the court is justified to set aside an 'inadvertent' and a 'wrong' order made 'hastily'. I am fortified in holding onto this view by the passages that appeared in the judgment of Boyd J in the case of *Sara Mehaffey v David Mehaffey* (1905) 2 Irish Reports 292 when his Lordship said at pp 295–296 of the report:

> However, the defendant allowed judgment to pass against him by default for the sum of 78 pounds 6 shillings and 11 pence. In my opinion this judgment was obtained by the fraud and collusion of the plaintiff and the defendant, and for the purpose of defeating the rights of the next-of-kin of the deceased, who are entitled to her estate after the deaths of the plaintiff and defendant. I think the statements in the affidavit filed by the plaintiff to resist this motion are the most conclusive evidence of fraud and collusion.
>
> As to the second point in the case, I am of opinion that the applicant, Hugh Mehaffey, as one of the next of kin of the deceased, has a right to intervene, and to apply to this court to set aside the said judgment. The cases relied on by the plaintiff and the defendant have no application to the facts of this case. It is alleged that if the applicant has any rights, his remedy is in the Chancery Division, and not in this Division. If he proceeded in the Chancery

> Division, I am of opinion that Division might decline to set aside the Common Law judgment. It might, no doubt, restrain the plaintiff from proceeding on the judgment, but it could not set it aside, and I consider it would be a disgrace on our procedure if a judgment obtained by such palpable fraud as exists in this case should be allowed to continue on the files of this court.

Boyd J in *Sara Mehaffey* emphasized that the existence of 'fraud' and 'collusion' would create exceptional situations where the court could invoke its unlimited jurisdiction to attack and strike down judgments and orders by way of collateral proceedings. And Miss Kim Lin submitted that only in those exceptional circumstances would a court ignore and put aside all procedural objections. She submitted that the averment of illegality by the plaintiff in the present case did not fall into that class of cases under the Badiaddin's principle. It must be recalled that the issue of illegality in the Badiaddin's cases constituted an outright violation of an express prohibition of the Enactment, namely, the Malay Reservations Enactment (FMS Cap 142) when the court of first instance gave an order for sale under the 1990 order. Such order for sale was frowned upon by the Federal Court in its unanimous decision. The illegality issue that was averred and advocated by the plaintiff did not concern the third to the fifteen defendants at all. This seemed to be the crux of Ms Wong Kim Lin's submission. But all the same she said that she submitted on the illegality issue in order to assist the court as well as to serve as an 'amicus curiae' bearing in mind the undertaking that was given under the consent order dated 13 March 1998 by the third to the fifteen defendants as seen at para 2(a) of the consent order which was worded in this way:

> Perwira Affin Bank ('the bank') within 14 days of setting aside of stay orders respectively will apply to the High Court and Land office for a new auction date for land held under Grant 7188 and EMR 2532, respectively. The intervenors undertake to support this application.

Ms Wong Kim Lin then referred to paras 11A and 15A of the plaintiff's amended statement of claim as seen in encl 31 and she submitted that it was a case of a mere 'tainting' of the loan transaction on account of Asialand's non possession of the developer's licence at the time when the charges came into force and were executed. That being the case, it was her submission that it was necessary to scrutinize the loan documentation so as to examine the extent and the purport of the illegality issue on the loan transaction. For this purpose she referred to the affidavit of the first defendant that was affirmed by Yeo Khay Ann as seen in encl 44 which annexed as a bundle the two relevant charges as exh 'A 15'. She submitted that these two relevant charges followed the standard format of the charges as seen in Form 16A that was registered by the first defendant except that there was an indorsement which was worded in this way:

> Gadaian ini adalah tertakluk kepada 'caveator's interest'.

and it was submitted that such an indorsement did not appear in the charges for the other two master titles, namely, Grant 7188 of Lot 94 and EMR 2532 of Lot 201.

It was part and parcel of Ms Wong Kim Lin's submission that the first charge as reflected in exh 'A 15' of encl 44 was for RM300,000 and it was dated 18 August 1977. She referred to p 234 of encl 44 of cl 1 particularly at line 8 and she stated that it was expressly stated that the purpose of the loan was for Asialand 'to overdraw its account' which, according to her, must necessarily mean that the RM300,000 facility was in the form of an overdraft granted in favour of Asialand — a development company that had no development licence for the project. Again it was part and parcel of her submission that in respect of the illegality issue whether it would be deemed at law to be illegal must be read in the context of s 24 of the Act. She ingeniously posed two questions worded in these ways:

(1) Was the overdraft of RM300,000 given to Asialand to be construed as a contract that was forbidden by the 1973 Act in pursuance of s 24(a) of the Act?

(2) Was the overdraft facility in the nature of a contract that if permitted would defeat the 1973 Act in pursuance of s 24(b) of the Act?

and she ventured negative answers for these two questions. Flowing from these lines of approaches, she then submitted that the overdraft facility given by the first defendant to Asialand — which was unlicensed at the material time, was not illegal and void. She drew support for her submission by referring to the definition of the words 'housing development' in the 1973 Act and those words were defined as:

> 'Housing development' means to develop or construct or cause to be constructed in any manner more than four units of housing accommodation and includes the collection of monies or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; or the sale of more than four units of housing lots by the landowner or his nominee with the view of constructing more than four units of housing accommodation by the said landowner or his nominee.

She too relied on s 5(1) of the 1973 Act which had been reproduced in the early part of this judgment and she surmised that the object of the 1973 Act was to control persons who were engaged in the business of development and construction of housing accommodation for sale to members of the public so that the members of the public would not be defrauded, and nothing else. She submitted that there was nothing in the overdraft facility that was granted to Asialand, with or without a licence, which had infringed the object of the 1973 Act. For these reasons, she submitted that the first charge in the form of an overdraft facility from the first defendant to Asialand was not tainted with illegality when it infringed the 1973 Act and neither was it void under s 24(a) or (b) of the Act.

In regard to the second charge as reflected in exh 'A 15' at p 244 of encl 44, it was in the nature of a loan facility for RM1,650,000 dated 18 August 1977 and it covered all the five master titles save and except Grant 7188 of Lot 94 and EMR 2532 of Lot 201 which did not have the following indorsement:

> Gadaian ini adalah tertakluk kepada 'caveator's interest'.

In regard to the annexure to the second charge as seen at p 248 of encl 44 at cl 1.02 under caption 'Application for sub-division', it was submitted by Ms Wong Kim Lin that that clause ought to be read with cl 2.03 under caption 'Utilization of the Loan' which stated that:

> The loan shall be used and applied for by the borrower for the purpose of completing the project and meeting all expenses including payment of development costs premium fees and outgoings payable to the appropriate authorities and professional charges connected with the project.

She then drew my attention to the letter from the first defendant to Asialand dated 6 December 1979 which letter was exhibited as exh 'A 16' to encl 44 at p 263 thereof and that letter was said to be a letter of offer reconfirming with Asialand the terms of the loan facility which was described as a bridging loan of RM1,650,000. She then posed a question as to whether a bridging loan of this nature that was granted to Asialand without a developer's licence at the material time of the charge but subsequently obtaining a licence when the development was in progress pertaining to the lands under the master titles, constituted an infringement of the 1973 Act. She ventured an answer to the question posed and it was in the negative. She submitted, rather well, when she said that there was no infringement of the objects of the 1973 Act for reasons that no developer would be willing to expend monies to apply for a developer's licence for a specific project without being absolutely certain that the sub-division and conversion of the lands can be done and for the appropriate layout plans to be approved by the relevant land authorities. She submitted that in the interim period the developer needed funds to expend for the conversion premium, sub-division processing costs together with the developer's licence application costs and all these funds would come from the bridging loan — just like the bridging loan that was extended to Asialand. In the context of the present case, it was her submission that there was no infringement of the object of the 1973 Act when the first defendant allowed Asialand to use the bridging loan for the aforesaid costs. It was also her contention that the undertaking of the first defendant under the second charge in favour of Asialand was entirely an exercise to promote the object of the 1973 Act in order to assist 'budding' development company like Asialand to embark on development projects. She submitted that the commendable act of the first defendant in advancing the loan to the plaintiff should be lauded instead of being condemned by the plaintiff as an illegal act. With respect, the plaintiff was not a deserving candidate to receive those nice words. In fact, it was the plaintiff who brought up the issue of illegality in his amended statement of claim in encl 31. She then drew my attention to an Assignment Agreement dated 18 March 1982 which was annexed as an exh 'GGC–12' of encl 104. In this assignment agreement particularly at para 7 thereto both the plaintiff and Asialand had jointly confirmed that the requisite developer's licence in respect of the development project over the five master titles had been duly obtained. But the authenticity of para 7 of the Assignment Agreement must be read in the context of paras 11A and 15A to the amended statement of claim in encl 31 where the plaintiff had admitted that he had been involved in the development industry since 1972 (see para 11A of encl 31) and that

he knew that his company — referring, of course, to Asialand, did not have a development licence but yet he continued charging his lands as security to the first defendant. Now, the plaintiff changed his tune to suit his needs. Having failed to pay back the loan to the first defendant, the plaintiff was now using the arguments that since Asialand — his company, had no development licence then the charges created over his lands were illegal and, consequently, he was entitled to ask for the return of the land titles. The plaintiff must be held accountable. He was the chairman, director and a major shareholder of Asialand and certainly he had absolute control to draft the assignment agreement in the way it was drafted. He was, so to speak, a master of his own destiny. In the amended statement of claim in encl 31, the plaintiff admitted that the court should strike out the plaintiff's claim on the ground of illegality. Having subjected the affidavit evidence to critical examination, I must come to the conclusion that the plaintiff's claim was tainted with illegality because Asialand had obviously contravened an express statutory provision in the 1973 Act requiring a licence for carrying out a housing development. Tainted with illegality, the plaintiff's claim must fall like a deck of cards and I would not lend my aid to him at all. A cause of action founded on illegality must surely fail in limine. The plaintiff relied on the case of *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Interveners)* [1996] 2 MLJ 431 but that case was of no assistance to him. In that case, the plaintiff was the bank who was applying for an order for sale and since the claim was tainted with illegality the court there refused to grant an order for sale. Here in the present case, the cunning plaintiff was seeking to claim back the land titles from the first defendant and this court would not assist him because his claim was tainted with illegality. To borrow the words of Lord Eldon in the case of *Muckleston v Brown* (1801) 6 Ves 52, 69: 'Let the estate lie where it falls.' Proceeding further, I must refer, once again, to the case of *Holman v Johnson* which was also reported in another law report vide (1775) 1 Cowp 341 at p 353 where Lord Mansfield aptly said:

> The objection, that the contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio.*

and what his Lordship had said had been applied to a string of cases such as *Lowry v Bourdieu* (1780) 2 Doug 468; *Lubbock v Potts* (1806) 7 East 449; *Thistlewood v Cracroft* (1813) 1 M & S 500; *Re Scott* (1813) 1 M & S 751; *Simpson v Bloss* (1816) 7 Taunt 246; *Ex p Brookes* (1822) 1 Bing 105; *Goodall v Lowndes* (1844) 6 QB 464; *Begbie v Phosphate Sewage Co* (1875) LR 10 QB 491 (affirmed and reported (1876) 1 QBD 679; *Allkins v Jupe* (1877) 2 CPD 375; *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724; *Re Myers* [1908] 1 KB 941; *Wild v Simpson* [1919] 2 KB 544; *Parkinson v College of Ambulance and Harrison* [1925] 2 KB 1; *Re National Benefit Assurance Co* [1931] 1 Ch 46; *Berg v Sadler and Moore* [1937] 2 KB 158; *JM Allan (Mechandising) Ltd v Cloke & Anor* [1963] 2 QB 340; *Shaw v Shaw*

[1965] 1 WLR 537; *Ashmore, Benson, Pease & Co Ltd v AW Dawson* [1973] 1 WLR 828; *Spector v Ageda* [1973] Ch 30 and *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168 that was applied in *Mansouri v Singh* [1986] 1 WLR 1393. As I see it, once the court becomes aware of the illegality either from the pleadings or from some other sources, it will certainly be fatal to the plaintiff's case (*Holman v Johnson* (supra); *Thomas Brown & Sons v Fazal Deen* (1962) 108 CLR 391; and *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301).

The plaintiff in the present case was certainly caught by the 1973 Act. It would certainly be correct to assert that any act of illegality committed by Asialand would be deemed as though it was committed by the plaintiff. Put in another way, the plaintiff would be placed in the same position as Asialand in that the plaintiff was in '*pari delicto*' to the illegality. Even without lifting the corporate veil of Asialand, the close relationship and proximity between the plaintiff and Asialand must surely mean that the plaintiff was and is the '*alter-ego*' of Asialand. Since the plaintiff in his amended statement of claim in encl 31 pleaded the alleged admitted act of illegality on the part of Asialand to find a cause of action against the first defendant as well as the alleged '*lack of jurisdiction*' on the part of the court for advancing any collateral attack against the first defendant's order for sale, then it would be correct to say that in fact the plaintiff was pleading his own '*illegal act*' to find a cause of action against the first defendant. In such a situation Mr Leong Wai Hong, the learned counsel for the first defendant, was entirely correct when he submitted and advocated the idea that this court should not render any assistance to the plaintiff on the basis of his own self admitted 'illegal act'. In the same vein, I too must refrain from assisting the plaintiff in the latter's claim against the first defendant for the return of the security properties because the plaintiff was guilty of an immoral act. In my judgment, it would be a gross fraud on the first defendant when the plaintiff being the chargor of the subject security and a self confessed 'alter-ego' of Asialand (the principal borrower) who, having taken the loan facility from the first defendant and had used that loan for the subject development project to build and sell bungalow houses, had defaulted in all their (Asialand — the principal borrower) repayments thereto and now had come before this court pleading their (Asialand — the principal borrower) own very act of 'illegality' for having infringed the 1973 Act for the sole purpose of asking and imploring this court to set aside the loan facility and to strike down the order for sale without having to make any repayment to the first defendant nor to return the relevant land titles to the third to the fifteen defendants — the rightful interveners, under the specific performance judgment. Indeed the plaintiff did not even deny the averment in encl 104 to the effect that the principal sum of RM1.6m plus had not been repaid. Yet the plaintiff had the audacity to raise the issue of disputable interest charges to prove 'a cause to the contrary' as envisaged in *OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 MLJ 544. In my judgment, this was an immoral act of the highest order ever coined by an individual and this court will not lend its assistance to the plaintiff at all (*Tye Kow (t/a Hup Lee Trading) v Yap Seow Hwa & Anor* [2000] 5 MLJ 175). The scenario was

certainly appropriate for this court to lift the corporate veil (*Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97). In my judgment, this was indeed a case justifying the lifting of the corporate veil. Ms Wong Kim Lin was in total agreement with Mr Leong Wai Hong when the latter submitted that in a claim where the plaintiff pleaded his own admitted act of 'illegality', the plaintiff should not obtain the assistance of the court and whatever had transpired illegally should be allowed to remain and the issue put to rest forever. The plaintiff, in my judgment, must be halted from abusing the process of the court. The only way this court could do so would be by invoking its wide and far reaching jurisdiction under O 18 r 19 of the RHC (*Tractors Malaysia Bhd v Tio Chee Hing* and *Siang Yam Beng v Marushin Canneries (M) Sdn Bhd & Anor*). This court too could invoke its inherent jurisdiction to mete out justice in a summary way under O 92 r 4 of the RHC by striking out the plaintiff's claim, at this point of time, in order to prevent an abuse of the process of the court. This was my judgment and I so hold accordingly.

Res judicata

For both encls 64 and 82

Factually speaking the averments in encls 44, 81 and 104 brought to the fore the doctrine of res judicata. Once the matter has been litigated between the parties, it should be regarded as forever decided. It must be recalled that the order for sale for master title Grant 7188 for Lot 94 was granted by NH Chan J (as he then was) more than ten years ago in the presence of the plaintiff's counsel in Kuala Lumpur Civil Suit No S5–31–1641–87. Subsequently, the SAR gave consequential orders pursuant to the order for sale and this was also done in the presence of the plaintiff's counsel. The plaintiff was contented and did not appeal against these orders. It would be interesting to note that the order for sale dated 5 September 1988 that was granted by NH Chan J (as he then was) showed that the plaintiff who was the defendant in Civil Suit No S5–31–1641–87 was represented by a counsel in the person of Mr P Rajasingham. As I see it, the matter would now be governed by the doctrine of res judicata. The plaintiff could have raised all the issues in the amended statement of claim in encl 31 in the hearing before NH Chan J (as he then was) on 5 September 1988. Even the issue in regard to the illegality of the charges because the borrowing company, namely, Asialand had no development licence could have been raised in the hearing before NH Chan J (as he then was). The issue of illegality was known and could, with due diligence, come to the knowledge of the plaintiff who was the defendant in Civil Suit No S5–31–1641–87. Surprisingly, the plaintiff did not deny the arguments of the first defendant in regard to the issue of res judicata. In so far as the third to the fifteen defendants were concerned, the plaintiff too did not allude to the issue of res judicata in his affidavit in reply in encl 98 even though there were averments of the relevant facts in encl 81 indicating the existence of res judicata.

A The sum total of it all would be this: that the plaintiff's claim should be struck out on the ground of res judicata.

At common law, the concept of 'functus officio' and the concept of 'estoppel by judicial record' are inter related to one another and these two concepts are usually advanced as procedural objections and they are often B used interchangeably to mean, usually, the same thing and the court will often arrive at the same conclusion. I need to go no further than to cite the case of *Leong Cheong Kweng Mines Ltd v Kok Hoong* [1962] MLJ 224 where Thomson CJ delivering the judgment of the Court of Appeal had this to say at p 227 of the report:

C Now, what we are concerned with in the present case is the particular sort of estoppel that arises from previous litigation between the same parties, 'estoppel by record', the circumstances in which previous litigation gives rise to admissions evidence to controvert which is inadmissible.

Any inquiry into this subject must inevitably commence from the following well-known passage from the judgment of De Grey CJ almost two hundred years ago in the *Duchess of Kingston*'s case: D

'From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; E secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument F from the judgment.'

Much the same thing was said by Henn Collins J in the case of *Robinson v Robinson* [1943] P 43 at p 44. The phrase 'res judicata', he said:

'... is used to include two separate states of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis for that judgment. All the parties affected by the G judgment are then precluded from disputing those facts, as facts, in any subsequent litigation between them. The other aspect of the term arises where a party seeks to set up facts which, if they had been set up in the first suit, would or might have affected the decision.'

The same distinction was observed by Lush J in the case of *Ord v Ord*:

H 'The words "res judicata" explain themselves. If the res — the thing actually and directly in dispute — has been already adjudicated upon, of course by a competent court, it cannot be litigated again. There is a wider principle ... often treated as covered by the plea of res judicata, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the court in the earlier proceedings and I which he chose not to put forward.'

The Court of Appeal in *OCBC Bank (M) Bhd v Kredin Sdn Bhd*, applied vigorously the doctrine of res judicata and held, inter alia, that when an

issue could and should have been raised in an earlier proceeding, one was precluded from raising it in a subsequent action. Likewise in the present case, the plaintiff — Tan Ah Tong, could and should have raised the issue of illegality of the charge at the hearing before NH Chan J (as he then was) in Civil Suit No S5–31–1641–87 and since the plaintiff did not do so he was precluded from raising it in the present suit. A

I need to revert back to the salient facts. It would be apparent that the plaintiff had ample opportunity to air his grievances on numerous prior proceedings which had transpired between the same parties herein, namely, the plaintiff, the first defendant, the second defendant to the fifteen defendants. Prior proceedings where the plaintiff had been duly served and duly represented were: B C

(a) In Kuala Lumpur High Court Originating Summons No S5–24(31)–1641–87 where the order for sale dated 5 September 1988 which the plaintiff sought to set aside was reflected in prayer 1 of p 17 of the amended statement of claim in encl 31, and this was granted by NH Chan J (as he then was), by way of inter partes. D

(b) In Kuala Lumpur High Court Originating Summons No S5–24–747–89 (see exh 'GGC 7A' of encl 104) which was basically the setting aside of four charges vide presentation numbers 284/80, 285/80, 815/78 and 816/78 and the proceedings were served on the plaintiff's counsel, namely, Messrs T Ariarajah & Co. In that case, after hearing all the relevant parties, NH Chan J (as he then was) gave directions to all the interested parties to file their respective proceedings in order to join in the hearing with the plaintiff's proceedings in Kuala Lumpur High Court Originating Summons No F31–3627–86 since it related to the same subject lands. E

(c) In Kuala Lumpur High Court Originating Summons No F31–3627–86, the plaintiff joined in these proceedings where the plaintiff was duly served as the third defendant therein (see the consent order dated 13 March 1998 as reflected in exh 'GGC3' of encl 57). But the plaintiff was not interested to participate in these proceedings since no arguments nor submissions were made on the plaintiff's behalf despite the fact that the plaintiff was represented by Mr T Ariarajah. The notes of proceedings in exh 'A10' at p 122 of encl 44 showed that on 26 July 1991 the plaintiff was represented by Mr T Ariarajah in Kuala Lumpur High Court Originating Summons No F31–3627–86. It can therefore be surmised that between 26 July 1991 to 13 March 1998, the plaintiff had ample opportunity to air all his grievances through submissions along the lines of the amended statement of claim in encl 31 including the issue of illegality, which had incidentally been canvassed before NH Chan J, but the plaintiff declined to do so. That being the case the plaintiff was forever barred from pursuing the matter further and this would come squarely within the principle of issue estoppel by judicial record. F G H I

(d) In Shah Alam High Court Originating Summons No 25–67–1994 as seen in exh 'A4' of encl 44, the plaintiff in his capacity as an applicant

A filed proceedings for the same reliefs as pleaded in the amended statement of claim in encl 31 save for the illegality issue and in this originating summons the plaintiff cited the first defendant as a respondent.

It would be interesting to read the affidavit of Tan Kwe Hee in the Shah B Alam High Court Originating Summons No 25–67–1994 where he deposed on behalf of the first defendant who was cited as a respondent (see exh 'A5' of encl 44) and there he said, inter alia, at para 6 thereto that:

> The purchasers had also in the meantime filed actions in Kuala Lumpur High Court OS No F31–3627 of 1986 against the Bank who are the Chargees of C the five (5) pieces of land for, inter alia, a declaration that the charges created by Tan Ah Tong were null and void. Tan Ah Tong was also made a defendant to the actions but did not resist the actions.

and there was no reply from the plaintiff in regard to these averments. It is germane to mention that in 1994 the arguments and submissions on the D validity of all these charges were still on going between the first defendant and the third to the fifteen defendants in the Kuala Lumpur High Court Originating Summons No F31–3627–86 which finally culminated in the final consent order dated 13 March 1998 before NH Chan J (as he then was). Indeed if the plaintiff had been an interested party before NH Chan J (as he then was), his Lordship would certainly have taken due cognisance E of the plaintiff's interests in the consent order. But this was not to be. In my judgment, the plaintiff was negligent in protecting his own interests as the registered proprietor of those lands before the court in Originating Summons No F31–3627 of 1986 and he must, consequently, bear the consequences of his own negligence. The plaintiff would be estopped forever by the records of the Originating Summons No F31–3627 of 1986 F from bringing up any other issue pertaining to the subject lands. This was certainly not the case like *Evans v Bartlam* [1937] AC 473 where the order granted by default could readily be set aside on account of 'irregularities'. This was also not the case where the plaintiff could bring his predicament under the 'special circumstances' situation and an exception to the general G rule of functus officio under the principles of the case of *Hock Hua Bank Bhd v Sahari bin Murid* because all the facts in respect of the alleged 'irregularities' were available to the plaintiff at the material time. The plaintiff knew about those alleged 'irregularities' as far back to the time period of 1970 to 1980 when the six bank charges came into force and those alleged irregularities may be itemized in these ways:

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(1) Whether Asialand had obtained its developer's licence?

(2) Whether the master titles were subdivided?

(3) It may be recalled that the two orders for sale were granted for the master titles in 1988 to 1989 by way of inter partes hearing and the I plaintiff did not bother to appeal for the review of those orders. This meant that the plaintiff admitted by record that those orders were in fact correct.

(4) The plaintiff took a different course of action and launched a collateral attack by filing the amended statement of claim in encl 31 but somehow he failed miserably to show in his reply affidavits that his claim were under the special exceptions or exceptional circumstances as alluded to by the principles as set out in *Hock Hua Bank* and *Badiaddin.*

(5) All the facts and the purported complaints pertaining to the 'irregularities' as against the first defendant were available and were before the Kuala Lumpur High Court Originating Summons No F31–3627–86 before NH Chan J (as he then was) between 1991 to 1998, yet, sad to say, the plaintiff failed to take advantage of them (*OCBC Bank (M) Bhd v Kredin Sdn Bhd*).

It would be pertinent, at this juncture, to refer to some cases. In *Air Conditioning Systems Design Sdn Bhd v Chuah Teong Hooi & Anor (as receiver and managers of the property of Atlas Intek (M) Sdn Bhd)* [1998] 4 MLJ 633 (CA), the court penalized the plaintiff there for being inordinate in prosecuting his action, which action was dismissed, and the court too upheld the plea of res judicata in favour of the defendant in regard to the second suit which the plaintiff instituted against the defendant. Likewise here, the present plaintiff was estopped from taking out the present suit purportedly on a further and different cause of action which was available to him at the outset.

In *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 (SC), the court was concerned with the question of whether the judge was functus officio in setting aside an order for sale of charged land after the land had been sold by public auction. The facts of that case may be stated as follows. The respondent was the registered owner of a piece of land and he obtained a loan from the appellant bank and as security he charged the land to the appellant bank. The charge was duly registered. The respondent failed to repay the loan and the appellant bank applied to the court for an order for sale of the charged land. The court granted the order for sale on 29 August 1988 and the land was to be sold by public auction. After several unsuccessful attempts to auction off the land, finally the land was sold to one individual by the name of Ng Choon Meng on 24 March 1990 for RM110,350. The full purchase price was paid and the registrar then issued the certificate of sale by the court on 14 June 1990. Meanwhile, the respondent approached a buyer — the intervener, and offered to sell the land to him for RM105,000. The offer was accepted by the intervener and the appellant bank consented to the sale on terms. On 22 June 1990, the intervener applied to the court to intervene in the present proceedings. The learned judge allowed the application and ordered, inter alia, that the public auction of the land held on 24 March 1990 be set aside. The appellant appealed against the judgment. In allowing the appeal, the then Supreme Court held that the auction sale was properly conducted in accordance with the provisions of the NLC and the certificate of sale issued on 14 June 1990 was a valid registrable instrument under s 267 of the NLC. The then Supreme Court also held that the application to intervene was not made

A until a week after the issue of the certificate of sale by which time the auction sale was completed and the learned judge was functus officio. The then Supreme Court further held that the sale was a final order unless appealed against and once it was made, drawn up and perfected, the learned judge was functus officio and had no power to set aside the order for sale. In delivering the judgment of the then Supreme Court, Harun Hashim SCJ
B applied the *Hock Hua Bank*'s principle and extended it further to the functus officio concept as well as to orders for sale obtained ex parte.

Here the conduct and the inaction of the plaintiff must be construed against him. The illegality issue was raised too late in the day. In *London, Chatham & Dover Rail Co v South Eastern Rail Co* (1888) 40 Ch D 100
C (CA), the defendants' silence and inaction were held against them. Briefly, the facts may be stated in this way. Two railway companies had entered into an agreement with one another for the division of local traffic, which contained a submission to arbitration of any dispute thereunder which might arise, and the plaintiff having sued on this agreement, the defendants fought the question of its validity, and that alone, in the court below, as also
D in previous litigation which went to the House of Lords, and the defendants never set up their alleged right to arbitration under the submission until the hearing in the Court of Appeal, and it was held that by their silence and inaction they had precluded themselves from raising the objection. Cave J in *Moore v Gamgee* (1890) 25 QBD 244 (DC), at pp 248–249 held that a
E party having omitted to raise his objection on the first hearing had precluded himself from raising it even at the adjourned hearing.

For the reasons adumbrated above, the plaintiff's claim must be struck out on the ground of res judicata.

F *Mala fide and an abuse of the process of the court — for both encls 64 and 82*

The first defendant's affidavit in encl 44 alluded to these two issues and the response by the plaintiff was in the nature of a bare denial as seen in encl 56.

Instances of mala fide can be seen in encl 81. For instance, the sample of the standard sale of the land agreements dated 14 August 1974 between
G the plaintiff and the third to the fifteen defendants as land purchasers employed the words 'free from all encumbrances' and that it would be subject to the conditions indorsed on the title. Yet, sometime in 1977 to 1978 without the consent of the third to the fifteen defendants, the plaintiff proceeded to charge those lands involving in all a total of six charges to the
H first defendant. Another instance would be when the plaintiff without the consent of the third to the fifteen defendants proceeded to assign those lands to Asialand — his nominee company. Yet another instance would be Justice Siti Norma Yaakob's findings in her judgment exhibited as 'GGC–10' of encl 104 where the learned judge alluded to the fraud perpetrated by the plaintiff.

I Instances of mala fide can also be seen in encl 44. For instance, from 1973 to 1982, the plaintiff had sold the subdivided titles of master titles Grant 7188 of Lot 94, EMR 2532 of Lot 201, EMR 2146 of Lot 349,

EMR 2147 of Lot 350 and EMR 2251 of Lot 515 to various purchasers, and some of these purchasers have intervened in the present suit as third to the fifteen defendants. The plaintiff had failed to fulfil his obligations to the purchasers under the sale and purchase agreements and, consequently, the purchasers filed various court actions seeking specific performance. These actions were later consolidated. The High Court granted specific performance to the purchasers against the plaintiff and this was later confirmed by the then Supreme Court. The chronology of events to show mala fide on the plaintiff's part can be seen in encl 44. Suffice for me to say that the master titles were first charged by the plaintiff to the first defendant for a loan to Asialand. Later, the plaintiff sold the subdivided titles to various purchasers. Later, the purchasers obtained the order for specific performance from the then Supreme Court but the Supreme Court order could not be enforced because of the existence of caveats lodged by the first defendant. Another instance would be the extract of the local newspaper known as the *Malay Mail* as seen in exh 'A 7' of encl 44 which, inter alia, carried the report that: 'The original owner of the land had subdivided the land into housing lots and sold them to individuals. He subsequently resold the same piece of land to the developer.' It must be emphasized that the plaintiff merely gave a bare denial at para 6 of his affidavit in encl 56 in response to the whole of para 16 of encl 44. Yet another instance can be seen in exh 'A 8' of encl 44 which was the minutes of the meeting between the purchasers, developers and representatives of the Housing Ministry and it read, inter alia, to the effect that Tan Ah Tong — the plaintiff, had sold those lands to the purchasers and he later transferred the same pieces of lands to his development company by way of an assignment. It also stated that after creating this predicament to the purchasers of Taman Ukay, the plaintiff had disappeared. The minutes of the meeting also stated that the Housing Ministry called for the meeting in order to assist in solving the purchasers' predicaments. In short, the purchasers have become victims of the plaintiff's deception. Another instance can be seen in exh 'A 9' of encl 44 which was a circular letter enclosing the working paper for Asialand at Taman Ukay, Ulu Kelang, Selangor. It can be seen in the circular letter that the main cause of the problem was due to Tan Ah Tong – the plaintiff, who made double sale to the various purchasers whilst the land titles were still charged to the first defendant.

A B C D E F G

This was a sad tale of the plaintiff deceiving the defendants and using our judicial process to suit his whims and fancies. The rights of the first defendant and the purchasers have been prejudiced for more than 20 years after taking into account that the first sale of the land took place in 1973. The consent order recorded by NH Chan J (as he then was) on 13 March 1998 was a mere paper judgment. The plaintiff was certainly heartless. In order to obstruct the settlement reached between the first defendant and the purchasers, the plaintiff had filed this suit and had applied to stay the auction of those lands. It must be recalled that the plaintiff had made four applications to stay the auction for Grant 7188 of Lot 94 to three different High Courts in Kuala Lumpur as well as to the Court of Appeal and all these four applications have been dismissed with costs. It was part and

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parcel of my judgment that all the issues raised by the plaintiff in the present suit have been raised by him in those four stay applications. It was also my judgment, that the plaintiff's conduct showed that his claim was mala fide and it was an abuse of the process of the court.

Conclusion

In regard to encl 64, I allowed the appeal with costs. In regard to encl 82, I, without hesitation, allowed the prayers sought therein. I have taken an arduous route to write this judgment. It was a necessary evil. The history of the whole case was chequered and it was necessary to highlight a number of facts peculiar to this case. I have endeavoured to critically examine the available affidavit evidence. No stones were left unturned. At the end of the day, the plaintiff's claim must surely fail. It was destined to fail. The plaintiff's claim must be struck out forthwith.

Application allowed.

Reported by Peter Ling